TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1[redacted] 1917

No. [redacted] 194

THE UNITED STATES, APPELLANT,

vs.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS OF JAMES D. LEARY, DECEASED, LUTHER LAFLIN KELLOGG, AND THE NORFOLK & WESTERN RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED JUNE 15, 1916.

(25357)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 527.

THE UNITED STATES, APPELLANT,

vs.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS OF JAMES D. LEARY, DECEASED, LUTHER LAFLIN KELLOGG, AND THE NORFOLK & WESTERN RAILWAY COMPANY.

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UNITED STATES OF AMERICA, *ss:*

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the court house, in the city of Richmond, on the first Tuesday in November, being the second day of the same month, in the year of our Lord one thousand nine hundred and fifteen.

Present: Hon. Martin A. Knapp, circuit judge; Hon. Charles A. Woods, circuit judge; Hon. Edmund Waddill, jr., district judge.

Among other were the following proceedings, to wit:

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS of James D. Leary, deceased, appellants,
versus
THE UNITED STATES OF AMERICA AND LUTHER LAFLIN Kellogg, appelles; } No. 1277.

and

LUTHER LAFLIN KELLOGG, APPELLANT,
versus
THE UNITED STATES OF AMERICA, NORFOLK & WESTERN Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees. } No. 1278.

Appeals from the District Court of the United States for the Western District of Virginia, at Lynchburg.

Be it remembered that heretofore, to wit, on April 24, 1914, the transcript of the record of the said District Court in the said entitled causes was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

2 *Transcript of Record. Filed April 24, 1914.*

In the United States Circuit Court of Appeals, Fourth Circuit.
No. —.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, deceased, appellant,
versus
THE UNITED STATES OF AMERICA AND LUTHER LAFLIN Kellogg, appellees.

On Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg.

THE UNITED STATES OF AMERICA,
Western District of Virginia, to wit:

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg in and for said district, on the 24th day of January, 1914.

Honorable Henry C. McDowell, district judge.

Among other were the following proceedings, to wit:

In the District Court of the United States, for the Western District of Virginia.

In Equity. Bill, &c. Intervention. Final decree Dec. 13, 1913. Appeal.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, AND the Norfolk & Western Railway Co., defendants, and Mary C. Leary, administratrix, intervenor.

3 *Stipulation relative to record facts, etc., on appeal, &c.*

Whereas Mary C. Leary, as administratrix of James D. Leary, deceased, has taken an appeal to the U. S. Circuit Court of Appeals for the 4th Circuit from a decree rendered in the above stated cause on the 13th day of December, 1913; and whereas it is desired to shorten the transcript of the record on said appeal as much as possible: It is therefore stipulated between the undersigned as follows:

(1) That this stipulation shall be copied first into the transcript after the caption:

It is stipulated that a portion of the record of said cause necessary to be considered on the present appeal is incorporated in the transcript of the record on a former appeal taken by said Mary C. Leary, administratrix, to said Circuit Court of Appeals from an order denying her leave to intervene, entered in said cause on July 20, 1908, and is now omitted from the present transcript in accordance with paragraph 7 of rule 14 of the United States Circuit Court of Appeals for the 4th Circuit, to wit:

(a) The original bill of complaint of the United States with Exhibits E and F thereto.

(b) The answer of the Norfolk & Western Railway Co. to the said bill.

(c) Demurrer of L. L. Kellogg to said bill.

(d) Answer of L. L. Kellogg to the said bill.

(e) Order of June 2, 1904, sustaining demurrer, etc.

(f) Order relative to replication.

(g) Replication of complainant to answer of Kellogg, filed April 4, 1904.

(h) Petition for leave to intervene and proposed intervention of Mary C. Leary, administratrix, exhibited to court, April 17, 1908.

(i) Order to show cause thereof of April 17, 1908.

(j) Demurrer on motion of United States to strike petition for intervention, etc., filed May 30, 1908.

(k) Order of July 20, 1908, denying leave to intervene.

(l) Opinion of Judge McDowell of July 20, 1908.

(2) Exhibits A, B, C, D, to complainant's bill omitted from the transcript on the former appeal are to be omitted from the transcript on this appeal, it being now stipulated that the allegations of the bill in regard to the manner and means by which the engineering work was conducted so as to accomplish the fraud charged shall be taken as sufficiently averred and charged in the bill.

4 (3) It is stipulated that on the filing of the bill December 19, 1903, equity subpœnas were duly issued thereon, directed to the said defendants to the bill. Personal service of the subpœna and a rule nisi for injunction was made upon the Norfolk & Western Railway Company, and return on subpœnas having been made by the marshal that the defendants, Benajmin D. Greene and L. L. Kellogg were not found in the district, an order was made in terms of the statute requiring them respectively to appear, demur, plead, or answer to the bill on or before March rules, 1904, and directing publications of the same and service of a copy of said order on the said nonresident defendants wherever found, as provided by the statute in such case made and provided. Said publication was duly made, and personal service of said order was made upon said L. L. Kellogg and also upon said Benjamin D. Greene on January 18, 1904.

That said Benjamin D. Greene failed to appear, demur, plead, or answer to said bill at the time designated in said order or at any other time, and in due course, to wit, at April, 1904, rules of said court, a decree pro confesso was duly entered in said cause against the said Benjamin D. Greene.

The foregoing matters in this paragraph stated shall be taken as admitted, without the necessity of copying the orders, processes, and returns and entry of decree pro confesso into the transcript of this appeal.

(4) It is further stipulated that the Norfolk & Western Railway Company filed its answer to the bill admitting the fact that the 400 shares of its common stock in controversy stood on its books in the name of L. L. Kellogg and submitted itself to the jurisdiction of the court. This answer will be copied into the transcript.

(5) It is further stipulated that the rule nisi for an order to restrain pendente lite the Norfolk & Western Railway Company from transferring said 400 shares of its stock or paying dividends therefrom to said L. L. Kellogg came on to be heard at March rules, 1904, before the said court.

The defendant L. L. Kellogg filed a demurrer to the bill, and also filed and offered at said hearing his affidavits in the nature of an answer to the averments of the bill. Said demurer and affidavit are copied in the former transcript.

Complainants also filed and offered at said hearing a large amount of documentary evidence and depositions to support the averments of the bill, which shall be omitted from the transcript.

After arguments heard, the court on June 2, 1904, made an order overruling the demurrer of said L. L. Kellogg to the bill, re-

5 straining the transfer of said 400 shares of Norfolk & West-

ern Railway Company stock pendente lite, and the paying out of dividends thereon pendente lite, and directing that the said affidavit of said Kellogg be treated as an answer to the bill, and the complainants file exceptions or replication thereto by July rules, 1904.

This order has been copied into the former transcript on appeal.

At the July rules, 1904, replication was filed to the said answer by the complainant, which replication need not be copied into the transcript of this appeal.

(6) It is further stipulated, that prior to the filing of the said petition of Mary C. Leary, administratrix, for leave to intervene, and while the said cause was at issue between the United States and the defendant L. L. Kellogg, the following among other proceedings were had in said cause:

(a) That on or about December 21st, 1905 (the depositions being signed Dec. 23, 1905), under a stipulation between Solicitor for the United States and solicitor for said Kellogg, certain depositions of the said L. L. Kellogg and of Franklin Nevius were taken before Thomas A. Healy, a notary public in and for the county of New York and State of New York, which depositions were duly returned and filed by the clerk in the record of said cause in the clerk's office at Lynchburg, Virginia, on June 5, 1907; that said depositions reduced to narrative form are to be copied into the transcript on the present appeal.

(b) That on December 21, 1905, the said United States and said defendant L. L. Kellogg, by their solicitors, entered into two certain stipulations, which are respectfully indorsed "1st stipulation as to certain evidence Dec. 21, 1905," and "2nd stipulation Dec. 21, 1905, as to certain evidence," and which said stipulations were duly filed by the clerk in the record of said cause in the clerk's office at Lynchburg, Virginia, on January 1, 1906. That said stipulations shall be copied into the transcript on this appeal.

(c) That refered to and described and identified in said 2nd stipulation of Dec. 21, 1905, were two printed volumes of the testimony of witnesses on behalf of the United States taken on the proceedings before Commissioner John A. Shields for removal under section 1014 R. S. of Benjamin D. Greene, John F. Gaynor et al. from New York to Georgia, certified by said commissioner, together with a printed volume containing a copy of the jetty contracts, the originals of which were in evidence before said commissioner and referred to in said testimony, and together with a blue print copy of the

6 large Exhibit 319 in evidence before said commissioner and referred to in said testimony, and also two volumes of exhibits to said record. All of the aforesaid testimony and exhibits were duly filed by the clerk in the record of said cause in the clerk's office at Lynchburg, Virginia, on January 1, 1906, and also there was at the same time filed under said stipulation a volume of printed testimony of witnesses taken on the part of the defendant Greene et al. in said removal proceedings, certified by said commissioner and backed as "Vol. III." And also the United States placed on file for inspection

of counsel and the court a large number of original documents, of which copies, extracts, and references appear in said testimony and exhibits in said removal proceedings, and consisting of original checks, check-stub-books, and vouchers. That the aforesaid testimony and exhibits in said removal proceedings hereinbefore referred to was the testimony and evidence upon which the said John A. Shields, U. S. commissioner, made his finding of probable cause of guilt of the said Benjamin D. Greene, and required the said Benjamin D. Greene to enter into the recognizance or bond of January 29, 1902, referred to in the intervention of said Mary C. Leary, administratrix.

Also on January 1, 1906, there was filed in the record of said cause in said clerk's office under the terms of said 2nd stipulation of Dec. 21, 1905, and with same certain affidavits and exhibits therein referred to as Exhibits 700 to 718, inclusive.

(d) That on the aforesaid evidence mentioned in subparagraphs (a), (b), and (c) the case was ready for trial on the merits as between the United States and the defendant Kellogg when on April 18, 1908, Mary C. Leary, administratrix, filed her petition for leave to intervene in said cause, and on denial of the same further proceedings were delayed until after the entry of the mandate of the Supreme Court reversing the denial.

(7) At the opening of the trial on the merits on Oct. 29, 1913, the solicitor of the United States offered in evidence the testimony and evidence described in subparagraphs (b) and (c) of paragraph 6 above, which by said 2nd stipulation of Dec. 21, 1905, it was stipulated would or might be offered on the part of the United States, and the solicitor of said L. L. Kellogg offered in evidence the testimony and evidence described in subparagraphs (b) and (c) above, which by said 2nd stipulation of Dec. 21, 1905, it was stipulated would or might be offered on the part of said Kellogg and also offered the aforesaid depositions of said L. L. Kellogg and Franklin Nevius

7 mentioned in subparagraph (a) above, and also two stipulations between the solicitor for the United States and said solicitor for said Kellogg marked X and Y, and referred to in the order of the court made in respect to the objections of solicitor for said intervenor thereto.

On the offer in evidence of the said solicitor of the United States of the depositions in said removal proceedings, the solicitor for Mary C. Leary, administratrix, objected to the admission in evidence against her of the testimony of Robert F. Westcott, on the grounds objection reserved by said Kellogg in paragraph (1) clause (b) of said 2nd stipulation of Dec. 21, 1905, and upon the additional ground that said Westcott, being dead prior to the time when intervenor's petition for leave to intervene was filed she could not exercise the right of cross-examination claimed to have been accorded her in the order making the mandate of the Supreme Court the mandate of the said District Court. The solicitor for the United States then insisted

that said testimony of said Westcott was admissible against said intervenor, as one claiming an equity or title in the assets in controversy in privity to said Greene and arising subsequent to the giving of said testimony by said Westcott, and that Leary had constructive notice of said testimony at the time he became Greene's surety on the bond of January 20, 1902. The court reserved its decision, saying it would give only such effect to the testimony as it considered proper.

(8) It is stipulated that the testimony exhibits and documents mentioned in said 2nd stipulation of Dec. 21, 1905, and described in subparagraph (c) of paragraph 6 above need not be copied into the transcript on the present appeal, but all of the same, together with the index to said exhibits in said removal proceedings, shall be sent up to the said Circuit Court of Appeals by the clerk, properly identified, for its reference and consideration if needful, the same as if embodied in the transcript, and that the same need not be printed on the appeal unless said Circuit Court of Appeals should decline to consider the same otherwise.

(9) It is stipulated that for the purposes of this appeal, that it is conceded by the intervenor that the testimony taken on the aforesaid removal proceedings and offered in evidence in this case, even independently of the testimony of R. F. Westcott, fully establishes the conspiracy between the said Benjamin D. Greene, Oberlin M. Carter, and others, as charged in the bill, and the frauds committed by them in said Government contracts as charged, and that fraudulent profits of said contracts were divided between the contractors and said Carter as charged, and that said divisions of said profits between said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter were as stated in Paragraph VII of complainant's bill, and as shown more in detail in Exhibit E to the complainant's bill, and that the aggregate amount of the said fraudulent profits received for his share by said Greene was $722,528.03.

8

And it is conceded by the intervenor that the transactions purported to be set out in Exhibit F to complainants' bill were had as therein stated; but she does not concede that 100 shares of Delaware, Lackawanna & Western stock mentioned therein as having been sold through A. W. Kilborne & Co. for account of said L. L. Kellogg on March 23, 1900, were purchased with any of the said funds wrongfully obtained from said complainant by said Greene, or with the proceeds of investments or reinvestments of said funds by or on behalf of said Greene; or that the proceeds of the said 600 shares of Canada Southern Railway Co. stock referred to in said Exhibit "F" as having been sold on the 23rd day of March, 1900, through A. W. Kilborne & Co. for the account of Luther Laflin Kellogg or the proceeds of the 100 shares of Canada Southern Railway Co. stock mentioned in said Exhibit F as having been sold on the 26th day of March, 1900, through A. W. Kilborne & Co. were invested in whole or in part, directly or indirectly, in the shares of Norfolk & Western Railway Co. stock involved in this suit.

It is understood that the matters above stated as not conceded by the intervenor, the Government reserves the right to contend are fully established by the evidence.

(10) The following papers, documents, orders, and decrees shall be copied into the transcript of the record on appeal:

1. Order of May 20, 1913, entering mandate of the Supreme Court.

2. Order of May 20, 1913, allowing amendment of bill of intervention and fixing time for motions, answers, etc., and for taking testimony.

3. Amended bill of intervention of Mary C. Leary, administratrix, filed May 20, 1913.

4. Order of June 5, 1913, relative to motion of L. L. Kellogg to strike portions of amended intervention, and extending time, etc.

5. Order of June 30, 1913, striking out certain portions of amended bill of intervention.

6. Answer of the United States to amended bill of intervention, filed June 9, 1913.

7. Amended answer of L. L. Kellogg to complainant's bill indorsed filed in clerk's office Oct. 4, 1913.

8. Order of October 4, 1913, setting cause for hearing for Oct. 29, 1913.

9. Order of Nov. 6, 1913, making recitations of certain proceedings had before the court on Oct. 29, 1913, and Nov. 6, 1913, allowing amended answer of Kellogg to the complainants' bill to be filed nunc pro tunc as of Oct. 4, 1913, reopening the case for certain purposes and setting further hearing for Nov. 25, 1913.

10. Order of Nov. 29, 1913, reciting certain proceedings and reserving objections of Nov. 29, 1913.

11. Order of Nov. 29, 1913, placing certain proceedings of record and taking the case under advisement.

12. Certain proceedings had before the court on Nov. 29, 1913, and evidence certified by Judge McDowell.

13. Four letters identified by Mr. Strode in said last mentioned proceedings to James D. Leary, dated respectively, Dec. 14, 1899, January 19, 1900, May 21, 1901, and June 6, 1901, and filed Nov. 29, 1913.

14. Stipulation between the United States and defendant Kellogg of Oct. 27, 1913, filed Oct. 29, 1913, and marked X, referred to in orders of Nov. 6, 1913, and Nov. 29, 1913.

15. Stipulation between the United States and defendant Kellogg, and affidavit of Kellogg of Oct. 27, 1913, filed Oct. 29, 1913, and marked Y, referred to in orders of Nov. 6, 1913, and Nov. 29, 1913.

16. Depositions of L. L. Kellogg and Franklin Nevius, taken Dec. 23, 1905, hereinbefore referred to.

17. Stipulation No. 1, dated Dec. 21, 1905, between the United States and defendant Kellogg hereinbefore referred to.

18. Stipulation No. 2, dated Dec. 21, 1905, between the United States and the defendant Kellogg, hereinbefore referred to.

19. Final decree of Dec. 13, 1913.

20. Order of Jan. 6, 1914, directing delivery of stocks and payment of money into court, and fixing penalty of supersedeas bond to be given by appellant Leary.

21. The assignment of errors filed by said appellant Leary on Jan. 24, 1914.

22. The assignment of errors filed by said Kellogg on February 27, 1914, as hereinafter mentioned.

(11) It is further stipulated as follows:

That the petition of Mary C. Leary, administratrix, for appeal from said decree of Dec. 13, 1913, was filed in said cause on Jan. 24, 1914; that the date of order granting said appeal is January 24, 1914; that the date when copy of order allowing appeal was lodged in the Clerk's office of said district court was January 24, 1914; that
10 the date of the supersedeas bond given by said appellant Leary is January 19, 1914. The penalty of same is $1,400. The obligor of same is the Globe Indemnity Company, a corporation incorporated under the laws of the State of New York. The condition of said bond is as follows:

"Whereas Mary C. Leary, administratrix of James D. Leary, deceased, seeks to prosecute an appeal to the United States Circuit Court of Appeals for the Fourth District to reverse a decree rendered and entered by the District Court of the United States for the Western District of Virginia, at Lynchburg, in the above stated cause on the 13th day of December, 1913: Now, if the said Mary C. Leary, administratrix, shall prosecute her said appeal to effect and answer all damages and costs if she fail to make her plea good, then this obligation shall be void; otherwise the same shall remain in full force and virtue."

That said bond was approved by Judge Henry C. McDowell and filed January 24, 1914.

That original citation directed to the United States was signed and issued by Judge Henry C. McDowell on January 24, 1914, returnable to said Circuit Court of Appeals at Richmond, Va., March 5, 1914. That service of same was acknowledged for the United States by the solicitor of record of the United States on February 7, 1914. That on February 10, 1914, on motion of said intervenor, Judge Henry C. McDowell signed and issued an amended citation directed to the United States of America and to L. L. Kellogg, returnable to said Circuit Court of Appeals at Richmond, Va., March 5, 1914. That service of said last-mentioned citation was made upon the said L. L. Kellogg in the City of New York on February 13th, 1914. That service of said last-mentioned citation was acknowledged for the United States by the solicitor of record of the United States on Feb. 14, 1914.

(12) That the appellant, Mary C. Leary, administratrix, did not serve any request upon the defendant L. L. Kellogg at or before taking her appeal requesting him to join in her said appeal, but after entry of appeal served citation upon said Kellogg as above.

(13) That on February 26, 1914, the said appellant, Mary C. Leary, administatrix, filed in the clerk's office a præcipe specifying the portions of the record she desired copied into the transcript, with proof of service of same on February 25, 1914, on solicitors of record for said United States and for said Kellogg, respectively. That on March, 7th, 1914, the solicitor of record of the United States filed in said clerk's office a præcipe of the record the Government de-
11 sired incorporated in the transcript. That up to the date of this stipulation no præcipe for such transcript or for additions thereto have been filed by or for said L. L. Kellogg. That the said præcipe filed for the said Leary and for the United States need not be copied into the record, but the originals shall be sent up to the circuit court of appeals, with the citation and other original papers, for inspection of that court, if need be. That all of the papers, orders, documents, specified in the said præcipe of Mary C. Leary as being desired by her to be copied into the transcript of the record, are included among the papers, orders, and documents which are by this stipulation required to be copied into the transcript on appeal, and the additional papers provided to be copied into the transcript, or sent up on the appeal, cover the additional matters desired by the United States as stated in its said præcipe, and that the clerk of said district court is to be guided by the provisions of this stipulation which take the place of said præcipes.

(14) It is further stipulated, that on Feb. 27, 1914, the said L. L. Kellogg filed a petition for appeal to the said Circuit Court of Appeals for the 4th Circuit from said decree of Dec. 13th, 1913, which petition is dated Feb. 21, 1914, and with said petition presented certain affidavits to the said District Court on February 27, 1914, also a bond for costs in the sum of $250, dated February 24, 1914, the obligors being L. Laflin Kellogg and National Surety Company, a corporation incorporated under the laws of the State of New York. The condition of the bond being that:

"If the above-named Luther Laflin Kellogg shall prosecute his appeal to effect and answer all costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue."

That said bond was approved by Judge Henry C. McDowell on February 27, 1914. Also on February 27, 1914, the said Kellogg filed in the clerk's office of said District Court an assignment of errors. That the said appeal of said Kellogg was entered and allowed by Judge Henry C. McDowell on February 27, 1914. That on February 27, 1914, said judge signed and issued a citation on said appeal directed to the United States of America, the Norfolk & Western Railway Company, and Mary C. Leary, administratrix of James D. Leary, deceased, returnable to said Circuit Court of Appeals at Richmond forty days from February 27, 1914. That said citation was served upon the solicitor of record for the United States on March 4, 1914, upon the solicitor for Mary C. Leary, administratrix, on

March 5, 1914, on the Norfolk & Western Railway Co. March 6, 1914.

12 The clerk will copy into the transcript the aforesaid assignment of errors filed by said Kellogg on February 27, 1914, as hereinbefore directed.

J. T. COLEMAN and
AUBREY E. STRODE,
Solicitors for Mary C. Leary, Admx., Appellant.
MARION ERWIN,
Special Asst. to the Atty. Gen., Solicitor of Record for the United States.

March 27, 1914.

Endorsed: Stipulation of March 27, 1914. Filed March 27, 1914. Stanley W. Martin, Clerk.

United States District Court, Western District of Virginia, at Lynchburg.

UNITED STATES OF AMERICA
vs.
B. D. GREENE, L. LAFLIN KELLOGG ET AL.

Order.

On motion of solicitor for Mary C. Leary, administratrix, appellant in the above stated cause from the final decree of this court of December 13, 1913, and the solicitor of record for the United States, now present, thereto assenting, it is ordered by the court that the stipulation between the said parties, dated March 27, 1914, and filed herewith, for the purpose of shortening the transcript of record on appeal, be and the same is hereby approved, and that the clerk of this court shall copy into the transcript of the record on the said appeal of the said Mary C. Leary, administratrix, only such portions of the record as by said stipulation it is desired by said parties to have copied into the transcript; and the said clerk shall identify and send up to the said Circuit Court of Appeals the additional papers, documents, and testimony which by said stipulation the said parties agreed should be sent up for consideration of the court under said stipulation. And the said clerk shall also send up to said Circuit Court of Appeals the original petition for appeal of the said Mary C. Leary from said decree of December 13, 1913, the order allowing appeal, the appeal bond, the citation, the return of service or waivers of service, and any other papers or documents which under the ruling of the Circuit Court of Appeals he is required to send up, outside of the transcript. And it is certified that the transcript of the record provided to be sent up by said stipulation, together with the papers referred to in said stipulation as being contained in the record of the former appeal of Mary C. Leary, administratrix, and together with the additional papers and documents which, under the

terms of said stipulation are not required to be copied into the transcript, but are required to be sent up to the Circuit Court of Appeals for its consideration, all of the record and proofs which the undersigned deem material for the purpose of the disposition of the questions to be decided by the Circuit Court of Appeals in said appeal.

The clerk will include in his transcript a copy of this order.

Endorsed: Enter, Henry C. McDowell. Entered March 27, 1914. Stanley W. Martin, Clerk. By Louis H. Price, Deputy.

13 *Bill. Filed Dec. 19, 1913.*

In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE ET AL. } In equity. Bill, etc.

To the honorable the Judges of said court:

[1] The United States of America brings this their bill of complaint against Benjamin D. Greene, a citizen of the State of Connecticut, temporarily residing at the city of Quebec, in the Dominion of Canada, against Luther Laflin Kellogg, a citizen of the State of State of New York, resident in the city of New York, and against the Norfolk and Western Railway Company, a corporation organized and doing business under the laws of the State of Virginia, and having its principal place of business at Roanoke, in said Western District of Virginia.

I.

Carter's duties, powers, and discretions.

And thereupon your orators charge, aver, complain, and say that from about the year 1888 until the 20th day of July, 1897, continuously, the said Oberlin M. Carter was an officer of the United States Army in the Corps of Engineers, and as such engineer in local charge in the Southern Judicial District of Georgia, of what is usually called the "Savannah district" for the improvement by the United States of rivers and harbors, and as such officer he was engaged in and about the execution of such river and harbor improvements as were made in said Savannah district during said period; and as such officer in charge of said Savannah district he was vested with sundry powers, duties, and discretions during said period, and amongst others:

With power, duty, and discretion in proposing from time to time to his superiors for adoption projects for the improvement of the rivers and harbors in said Savannah district.

With power, duty, and discretion in proposing from time to time to his superiors for adoption projects for the expendi[2]ture of moneys appropriated by Congress for the improvement of the rivers and harbors in said Savannah district.

With power, duty, and discretion in devising, drafting, and proposing from time to time to his superiors for adoption, specifications for contracts for such river and harbor improvements proposed to be made in said Savannah district.

With power, duty, and discretion in from time to time drafting and proposing to his superiors for adoption, forms of advertisements for giving notice to the public that competitive bids would be received by him for the construction of such proposed river and harbor works.

With power, duty, and discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids.

With power, duty, and discretion in proposing from time to time to his superiors for adoption, and causing to be fixed and fixing for such contracts to be let the time designated in the specifications within which the successful bidder would be required to commence work.

With power, duty, and discretion in giving out information in regard to such contracts to be let.

14 With power, duty, and discretion in from time to time receiving proposals for and recommending to his superiors the awarding of such contracts.

With power, duty, and discretion in approving or rejecting the bonds required to be given by such contractors.

With power, duty, and discretion in superintending the work being done by contractors under such contracts in said Savannah district; and in approving and accepting or rejecting material being put in and work done by such contractors in said Savannah district, according as the same was in accordance with the requirements of such contracts or not.

With power, duty, and discretion in from time to time approving modifications of such contracts and suggesting to his superiors the adoption of such modifications.

With power, duty, and discretion in from time to time approving or rejecting the accounts rendered to him by such contractors for material furnished and work done or claimed by such contractors to have been furnished or done by them under contracts let, according as such accounts should be fair and honest or false and fraudulent.

[3] With power, duty, and discretion when in funds intrusted to him as disbursing officer, in from time to time paying such contractors or refusing to pay them, the amounts claimed by them to be due them for material furnished and work done under such contracts let, according as such claims were fair and honest or false and fraudulent.

II.

The scheme devised to defraud.

That on or about the year 1891, the said Oberlin M. Carter and one Benjamin D. Greene, one John F. Gaynor, one William T. Gaynor, one Edward H. Gaynor, and one Michael A. Connolly (hereinafter for the sake of brevity called the conspirators), devised, concocted, and put in operation a certain fraudulent scheme for the purpose of defrauding your orators, the United States of America.

(1) That the said fraudulent scheme contemplated that the said Oberlin M. Carter, as such engineer officer in charge of said Savannah district should fraudulently exercise the said powers and of his office and discretion vested in him as aforesaid in favor of said conspirators and against the interest of the United States, and contrary to the duty and allegiance due by him to the Government under which he held such high and important trust.

15 (2) That said fraudulent scheme contemplated that by undue shortness of time in advertising the letting of contracts; that by withholding specifications from proposed bidders not in the conspiracy, as far as such withholding could be made consistent with the concealment of the fraud; that by drafting the specifications, so as to mislead proposed bidders not in the conspiracy as to the character and quantity of material really intended to be used in the work under the contracts, and by fraudulently and secretly furnishing to his coconspirators information as to the bids, and as to his future course as engineer and officer in charge, in the construction of the work under the contracts, the said Oberlin M. Carter would effectually suppress competition in the bidding for such contracts to be let for the United States through said Oberlin M. Carter, for said Savannah district, and that the said conspirators in the name of some one of them, or of some other person or corporation for their benefit, would be the only real bidders for such contract work [4] for construction of jetties, spur dams, and training walls for the improvement of the rivers and harbors in said Savannah district. That thus all such contracts which would be from time to time let for such work as aforesaid, would be obtained by some one or other of said conspirators or by and in the name of some other person or corporation but secretly for the benefit of said conspirators; to the end that the said river and harbor work in said Savannah district put out to be done on contracts, would be fraudulently let for the benefit of said conspirators at high and exorbitant cost to the United States of America, and at great profit to the said conspirators.

(3) That said fraudulent scheme further contemplated that said Oberlin M. Carter, as such engineer officer in charge as aforesaid, should in drafting the specifications for contracts to be let by competitive bids for what is commonly called mattress work to be used

in the construction of jetties, spur dams, and training walls in the river and harbor improvements in said Savannah district, would introduce into the specifications the novel provision of having two or more designs of mattresses specified, to be bid for by the proposed contractor at one price for either design; the one design to be very much more costly for the contractor to furnish than the other, or others, but the engineer in charge to have the option after the contract should be let to call for either design he might choose to have put in the work; with intent that the bid of any person not a party to said fraudulent scheme who should propose to bid on such contract would have to be based upon the most costly design of mattress so specified; as the one most apt to be called for by the engineer, while the said conspirators or the person acting for
16 them, would be informed by the said Oberlin M. Carter before the bidding that only the cheapest design of those specified in the specifications would be called for to be put in the works, and would thus, even if the other means to suppress competition provided for in the fraudulent scheme should fail, be able to bid a very high price for the contract, based on the cheapest design of mattress, and still underbid all others and obtain the contract.

(4) That said fraudulent scheme further contemplated that said Oberlin M. Carter, as such engineer officer in charge as aforesaid, should in drafting the specifications for contracts to be let for jetties, spur dams, and training walls in said Savannah district would specify so vaguely, and so uncertainly set forth the character, quality, quantity, description, and de[5]sign of the material to be used in the work, (a) that when the material was furnished by the contractor under such contracts as should be so fraudulently obtained for the benefit of said conspirators as aforesaid, the said specifications could and would by a fraudulent, strained, and lax construction to be placed upon the same, by said engineer in charge, be made to apparently justify the acceptance and approval which he would make for payment at such high and exorbitant prices of large quantities of material of very poor and cheap quality, description, and design, and of very small value to the United States, and (b) that when if by chance any person not a party to said fraudulent scheme should happen to be the lowest bidder and obtain any such contract in said Savannah district that by a fraudulent, unfair, rigid, and stringent construction to be placed upon the specifications by said engineer in charge, the specifications could and would be made to apparently justify the rejection which he would make of material furnished by such contractor of very much better quality, quantity, description, and design and of a greater value to the United States, with the intent that by such oppressive rejections the performance of such contract would be made ruinous to the contractor so having dared to compete with said conspirators in bidding for such contract, and thus that further competition with the said conspirators would thereafter be effectually cut off.

(5) That said fraudulent scheme further contemplated that on all work so let on contracts which should be obtained for the benefit of said conspirators as aforesaid, the said Oberlin M. Carter, as engineer in charge as aforesaid, would so instruct and locate the assistant engineers and inspectors under him, intended for inspecting the details of the work of construction, that there would be little,
17 if any, inspection of the details necessary to be inspected to insure the furnishing of honest work and material, and that the said Oberlin M. Carter as such engineer officer in charge would fraudulently accept for the Government under such contracts work done and material furnished known by him to be of inferior quality and quantity and not in accordance with the specifications, to the end that the United States might be defrauded with enhanced profits to the said conspirators.

[6] (6) That said fraudulent scheme further contemplated that the said Oberlin M. Carter, as such engineer officer in charge as aforesaid, would fraudulently approve for payment, and when in funds as a disbursing officer, fraudulently pay accounts which would be rendered to him as such engineer officer in charge as aforesaid by the said conspirators or by some one of them, or by or in the name of the person or corporation which should by the successful operation of said fraudulent scheme have obtained such contracts for the secret benefit of said conspirators, and which accounts should be rendered as aforesaid for such inferior material and work to be put into said work as aforesaid, and at the exorbitant and fraudulent prices stated in such contracts so fraudulently to be obtained by said conspirators as aforesaid.

(7) That said fraudulent scheme further contemplated that the said moneys so fraudulently obtained on such contracts by the said conspirators through the said Oberlin M. Carter, as such engineer officer in charge and disbursing officer as aforesaid, should be appropriated to the use of the said conspirators, and that they should aid each other in the concealment from the officers of the United States not parties to the conspiracy of the moneys from time to time so misappropriated, and of the investments thereof, to the end that said scheme might be further operated by them and that they might be secure from detection in the enjoyment of such moneys.

(8) That said fraudulent scheme further contemplated that out of the moneys so to be fraudulently appropriated by said conspirators as aforesaid certain portions, the full and exact amount of which is to your orators unknown, should be appropriated by the said William T. Gaynor and Edward H. Gaynor, and smaller sums by the said Michael A. Connolly, and that the net profits of such contracts after payments of said sums and the cost of the work would be divided between the principal conspirators, Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter.

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III.

The scheme to defraud put in operation.

That pursuant to the scheme to defraud the United States so devised, concocted, and agreed upon between the said conspir-[7] ators, the said Oberlin M. Carter, as such engineer officer in charge of said Savannah district, did, on or about the first day of January, 1891, commence to put said fraudulent scheme in operation in said Savannah district, and to exercise the said powers and discretions of his office in favor of the said conspirators and against the United States in accordance with said fraudulent scheme, and continued so to do as successive contracts were to be let and were let from time to time by said Oberlin M. Carter, as such engineer officer in charge as aforesaid, until on or about July 20th, 1897, when the said Oberlin M. Carter, as such engineer officer in charge as aforesaid, was relieved from duty and superseded. And each of the conspirators aforesaid commenced on or about the first day of January, 1891, to do and perform their parts in the accomplishment and carrying out of said fraudulent scheme to defraud the United States, and continued so to do as successive contracts were to be let, and were let, in said Savannah district from time to time, in the suppression of competition in the letting of the contracts; in the obtaining of the contracts in the name of some one of the conspirators or of some other person or corporation for the benefit of said conspirators at high, exorbitant, and fraudulent prices; in putting into the construction under the contracts poor, cheap, and inferior material and work not in accordance with the specifications of the contracts; in the rendering of accounts against the United States for such poor, cheap, and inferior material and work not in accordance with the specifications as aforesaid, and at said high, exorbitant, and fraudulent prices fixed in said contracts so fraudulently obtained for the benefit of said conspirators, as aforesaid; and in the approval and payment of said accounts by the said Oberlin M. Carter, as engineer officer in charge; and in the division of the said moneys so paid between the said conspirators and the concealment thereof, not only until the said Oberlin M. Carter was relieved from duty as such engineer officer in charge of said Savannah district, on or about July 20, 1897, as aforesaid, but thereafter continued and have continued until this date to aid and abet each other in the concealment of the moneys so fraudulently obtained from the United States through the operation of said scheme; and in their endeavor to obtain additional moneys from [8] the United States for work alleged to have been done under
19 such contracts so fraudulently obtained at the exorbitant and fraudulent prices secured in said contracts by the operation of said fraudulent scheme; and for the poor, cheap, and inferior material put into said construction, not in accordance with the specifications.

IV.

Description of the engineering work.

That the principal expenditures made by the United States in river and harbor improvements in said Savannah district both under General Q. A. Gilmore, the predecessor of the said Oberlin M. Carter in charge of said district, and under the administration of the latter, were in the construction of spur-dams and training walls, commonly included under the generic term of "jetties" and being a kind of dam or wall constructed of "logs and brush and stone" or of "brush and stone," so placed as to narrow the channel or so placed in reference to the channel as to effect the flow of the current, and as a result of the increased flow of water to cause an increase in the depth of the channel.

Prior to the formation of the scheme to defraud the United States formed on about January 1st, 1891, as aforesaid, the brush, or logs and brush, used in these jetties in the Savannah district were put into the construction principally in three ways:

Fascines: One of the principal materials used in the construction of jetty work was the brush fascine.

These fascines were usually among other things specified to be made of live brush, well trimmed, the butts of the brush to be placed in alternate directions and the fascine to be closely choked by ties of wire or tarred rope at intervals of every two or three feet, so as to form an artificial log of the diameter of from 9 to 15 inches at the choke, and from 12 to 20 feet in length, according to the specifications for the particular contract; the form of construction of a fascine being illustrated by drawing, Exhibit A, filed herewith.

(1) There were the training-walls and spur-dams built up of fascines, placed in the training-wall or dam by the contractor separately; that is to say, each fascine being put in place one at a time.

[9] Prior to the formation of said fraudulent scheme, as aforesaid, the prevailing contract prices for fascines so put in the works in the district ranged from 89 cents to $1.10 per cubic yard. That is to say, the fascines were piled up on top of each other and measured and the fascine material contained in a square yard of surface and of the depth of one yard cost the Government when placed in the work only from 89 cents to $1.10, according to locality.

(2) The brush mattress: In the contracts let prior to the formation of the said scheme to defraud, where the contract provided for the construction of training walls or spur-dams to be built up of fascines, it was provided that the engineer officer in charge could require the fascines to be placed in the jetty either singly or in mats, and when made into mats and so placed, the mats were paid for by the amount of fascine material composing them at the contract price

of fascines per cubic yard, ranging from 89 cents to $1.10 per cubic yard, as aforesaid. These fascine mattresses were usually constructed of a layer of fascines placed side by side upon a layer of transverse poles spaced at intervals of about 6 feet apart, and upon top of the layer of fascines were placed another layer of poles similarly spaced at intervals, the upper and lower poles being joined by ties of wire or tarred rope, so as to form a flexible mattress.

The form of construction of such a mattress is illustrated by drawing, Exhibit B, filed herewith.

In some of the contracts the fascines rest upon a grillage of poles instead of upon a single layer of poles at the bottom, and also there was a corresponding grillage of poles on top of the fascines. By a grillage of poles is meant a layer of poles spaced a few feet apart crossed by a second layer of poles similarly spaced. The form of construction of such a mattress is illustrated by Exhibit C, filed herewith.

When a mattress is constructed as shown in drawing, Exhibit B, the fascines are said to be placed between a half grillage of poles at the bottom and a half grillage of poles at the top, as there are only half as many poles used in such case as where there is a full grillage of poles at the bottom and at the top, as shown in drawing, Exhibit C.

[10] When a mattress was so constructed it was towed to its place, a single mat at a time, and loaded with stone and sunk in its place. The stone used in sinking such mats or in holding down the fascines when put in separately being paid for by the Government in addition to the price paid for the fascine material.

The reason that the contractor could afford to put in the fascines in mats as cheaply as when put in separately was that the extra material required in binding poles was fully compensated for by the less labor and difficulty involved in sinking the larger number of fascines going to make up a mat at one performance.

21 As a consequence the Government obtained such fascine mattresses as it used in said Savannah district prior to the formation of the conspiracy at prices ranging from 89 cents to $1.10 per cubic yard; equivalent for a mattress made of fascines 9 inches, or one-fourth of a yard in diameter, to 22¼ to 27½ cents per square yard of mattress surface; or equivalent for a mattress made of fascines 12 inches in diameter to 29⅝ to 36⅔ cents per square yard; or equivalent for a mattress made of fascines 18 inches in diameter to 44½ to 55 cents per square yard.

(3) The log mattress: There was also used in said Savannah district in jetty construction prior to the formation of said scheme to defraud what is commonly called a "log mattress." This is sometimes called, however, a "log and brush mattress," because both logs and brush were used in combination in its construction.

The principal design of this mattress was a raft of logs of the average diameter of 12 inches, placed side by side and fastened together with cross-poles placed as binders 8 feet apart and spiked to

the logs, and upon this raft was placed a top layer of live brush, or live brush fascines, from 5 to 6 inches in thickness in the finished work, and secured in place by poles lashed to the binders of the raft, thus making a mattress 18 inches thick, exclusive of the binding poles. The form of construction of such a log mattress is illustrated in drawing, Exhibit D, filed herewith.

These log mattresses were always paid for in contracts under General Gilmore and under Carter at a stipulated price [11] by the square yard surface measure, the price averaging about 47 cents per square yard prior to the formation of the conspiracy.

Prior to the formation of said scheme to defraud, whenever specifications had been drafted by Gilmore or by Carter in which it was provided that two or more different designs of mattress under the same contract should be bid on by the contractor it was always provided that separate prices should be bid for furnishing either of the designs the engineer might call for. Or if the contract called for only one price to be bid for two or more designs, it always left it optional with the contractor to furnish that design which he could furnish the most cheaply. So that always the contractor would know precisely the thing upon which he was bidding before the contract was let, and at the time he had to put in his bid in competition with other bidders.

22 V.

Details of the fraud introduced into and under the contracts.

Your orators further aver and charge that early in 1891 the said Oberlin M. Carter, as engineer officer in charge of said Savannah district, commenced to put in operation said fraudulent scheme in respect to the drafting, and by his recommendation causing to be approved by his official superiors specifications so drawn as to enable said conspirators to consummate said fraud upon the United States.

(1) That in the drafting of the specifications for contract No. 4572 for Cumberland Sound, advertised March 17, 1891, and let May 4, 1891, to John F. Gaynor, the said Oberlin M. Carter, as such engineer officer in charge, for the purpose of carrying into effect said fraudulent scheme, introduced into the specifications upon which proposed bidders would be required to base their bids for the contract three designs of mattress. Two of these designs were for log mattresses 16 inches thick in the finished work, similar to those provided for in the Gilmore contract of October, 1886, No. 3285, for Cumberland Sound, which allowed the contractor to use the design he preferred, but Carter provided in his specifications for a third design of brush mattress made of fascines 9 inches in diameter, and required bids for it by the square yard instead of by the cubic yard as such mattresses had heretofore been paid for, and he provided in the specifications that the engineer in charge

should have the option of substituting the "brush mattress" for the log mattress in the construction of the work.

[12] Having succeeded by use of said fraudulent scheme in suppressing competition and awarding said contract to John F. Gaynor at the rate of 99 cents per square yard for log mattresses, being double the price of the same theretofore prevailing, and at the rate of 97 cents per square yard for brush mattresses, being nearly four times the price of such mattresses theretofore prevailing in said Savannah district, the said Carter corruptly exercised his option in favor of said contractor and allowed him to put in all brush mattresses at the exorbitant rate of 97 cents per square yard.

(2) By a corrupt use of a similar brush mattress in the specifications in contract No. 4637, of July 20th, 1891, for jetties at Fort Clinch, let nominally to William H. Walsh, but for the benefit of said conspirators and by providing in the specifications for a
23 bid for mattresses per square yard and fascines per cubic yard, but leaving it optional with the engineer in charge to use either fascines separately or mattresses, and by the use of the said other means provided in said scheme for suppressing competition, the said Oberlin M. Carter succeeded in awarding the said contract as aforesaid at 99 cents per square yard for brush mattresses, equivalent to about $3.56 per cubic yard, while the fascines themselves were awarded in the same contract at only $1.57 per cubic yard when placed in singly and whereas theretofore such mattresses had only cost the Government the price of the fascines in them by the cubic yard. And having so awarded said contract said Carter corruptly exercised his option as engineer in charge by allowing said contractor to put into the work 7,744 square yards of mattresses at $3.56 per cubic yard and only 125 yards of fascines at $1.57 per cubic yard.

(3) In the specifications drafted by said Oberlin M. Carter as such engineer in charge for the contract No. 4820 next let to Edward H. Gaynor, September 16, 1892, the said Oberlin M. Carter, in pursuance of said fraudulent scheme and corrupt agreement, introduced the following novel features by which it was placed in the power of said Carter, at his will, to shut out all competition with the said conspirators in the bidding for such contract work, and which fraudulently secured to said conspirators an increase of four times the price for brush mattresses previously prevailing for same at the same locality.

[13] That is to say: Carter so drafted the specifications for contract 4820, which were adopted on his recommendation, as to provide for three different designs of mattresses, any one of which might be called for at his option by the engineer in charge, and to be paid for at the same price per square yard for either design furnished by the contractor.

The first design of mattress so provided for corresponded to the log mattress 18 inches thick, Exhibit D hereinbefore referred to.

The second design of mattress so provided for corresponding to the brush or fascine mattress, Exhibit C, hereinbefore referred to, except it had an additional cross layer of fascines in it, the additional fascines being spaced the same distance apart as the cross poles.

The third design of mattress so provided for corresponding to the brush or fascine mattress nine inches thick, Exhibit C, and being the same as the second design without addition of the cross fascines.

And while prior to the formation of said fraudulent scheme the prevailing price in said Savannah district of the first de-
24 sign of mattress was double that of the third design, said Oberlin joined them in his specifications to be bid on at one price.

And when, by means of suppressing competition through said fraudulent scheme said Oberlin M. Carter succeeded in awarding said contract to Edward H. Gaynor for the benefit of said conspirators, at the price of $1.05 per square yard surface measure, equivalent to $4.20 per cubic yard for brush material in the 3rd design or 300 per cent. higher than the prices which had prevailed in the same locality, said Oberlin M. Carter fraudently exercised the option reserved to him as such engineer in charge under the specifications, in the manner of which the conspirators only were apprised before the bidding and allowed the conspirators to put in all brush mattresses of the third and cheapest design, as aforesaid.

(4) In the specifications drafted by said Oberlin M. Carter as such engineer in charge for the contract No. 4960, next let to the Atlantic Contracting Company October 22, 1892, known as the "Big three million dollar contract for Savannah Harbor," the said Oberlin M. Carter, in pursuance of said fraudulent scheme, put in the same three designs of mattresses to be bid on at one price as in contract No. 4820, and giving the same option to the engineer to select after the letting of [14] the contract any one of the three for use in the construction, and having succeeded, by means of said fraudulent scheme, in awarding said contract to the Atlantic Contracting Company for the benefit of said conspirators, at the exorbitant and fraudulent price of 95 cents per square yard of mattress surface, equivalent to $3.80 per cubic yard for brush material in the 3rd design, the said Oberlin M. Carter, as such engineer in charge, fraudulently exercised the option reserved to him as engineer in charge and allowed the conspirators to put in all the mattresses of the third and cheapest design.

(5) Your orators aver and charge that not content with the fraudulent addition of about 300 per cent. to the cost of the fascine mattresses secured to the contractor in the letting of the contracts, as aforesaid, the said Oberlin M. Carter, under contracts Nos. 4820 and 4960, commenced, about September, 1893, to allow the contractors operating said contracts for the benefit of said conspirators to supply in lieu of the single mattress provided for in the specifications, and to put into the jetties, at one time and at one launching,

a construction of from 4 to 8 or more of single mats piled up one on top of the other and forming what is called a multiple mat, in which each single mat constituted a course or layer, but from which a large part of the material required by the designs of brush mattress in the specifications was omitted, and which multiple mat was very much cheaper for the contractor to put in than the cost of putting in the single mats composing it separately, as the specifications indicated they would be put in and authorized the engineer to require, and as other proposed bidders had to estimate for in putting in their bids.

And said Carter allowed said contractors not only to put in said material and work not in conformity even to the cheapest design of mattress provided for in the specifications, but of the poorest and cheapest and most inferior material which he could allow passed without detection of the fraud through a fraudulent and strained construction of the specifications. And said Oberlin M. Carter, as such engineer in charge, approved for payment and paid the accounts of said contractors for such work at contract prices for said work so put in.

(6) Your orators further aver and charge that by act of Congress passed in 1888, and repeated in act of 1890, Supplement Revised Statutes, page 600, it was provided that [15] river and harbor contracts shall be made "after sufficient public advertisement for proposals in such manner and form as the Secretary of War may prescribe." That section 520 of the Army Regulations, prescribed by the Secretary of War, prescribed and prescribes that the length of time for advertising for proposals for services by contractors for supplies or services should be 30 days or more, or 10 days or less, according to the needs of the service; large contracts for purchases or services should be 30 days or more. That section 519 of the Army Regulations prescribed that:

"Any officer charged with the duty of making a contract on purchase is responsible under the laws and regulations for his action. Permission or orders to make a contract or purchase without competition will not justify the procedure and will not be given."

And your orators aver and charge that while prior to 1890 the contracts in the Savannah district were mostly for comparatively small expenditures, from about $15,000 to $110,000; that after 1890 some of the contracts ran up to several million dollars each, being over $3,000,000 for Savannah Harbor contract No. 4960 for 1892, over $1,000,000 for Savannah Harbor contract No. 6515 for 1896, and over $2,000,000 for Cumberland Sound contract No. 6517 of 1896. Nevertheless, said Oberlin M. Carter, as such engineer in charge, in pursuance of said scheme to defraud the United States and to suppress competition, did not advertise the letting of any of the contracts let by him from 1891 to 1897, inclusive, for 30 days or more, but the advertisements for many of said lettings being run

26 only for 15 to 22 days in the local papers, and for a less time in the engineering papers in which Government advertisements were required to be published, and the time said advertisements were so run not being a sufficient public advertisement to enable contractors in different parts of the United States to ascertain the details sufficiently to intelligently put in competitive bids.

(7) Your orators further aver and charge that from 1891 to 1897, inclusive, the said Oberlin M. Carter, in pursuance of said fraudulent scheme to defraud the United States, systematically withheld from applicants therefor, as far as he could consistent with the concealment of the fraud, the specifications for contracts advertised by him, and delayed and hindered such [16] applicants in obtaining such specifications to the end that competition with said conspirators in proposals for contracts might be and was suppressed.

(8) Your orators further aver and charge that by applying said fraudulent scheme to the drafting of the specifications, in the manner hereinbefore described, for contracts Nos. 4572 and 4820, to each of the contracts subsequently advertised and let in said Savannah district, and by applying said fraudulent scheme in suppressing competition by shortness of advertising for proposals for contracts and by withholding specifications and delaying applicants in obtaining the same and by giving secretly to the said conspirators information as to how the said Carter, as engineer in charge, would exercise his discretion in construing specifications purposely by him made ambiguous or uncertain, the said Oberlin M. Carter, as engineer officer in charge, succeeded in awarding at high, exhorbitant, and fraudulent prices, every jetty contract let by him in said Savannah district from 1891 to 1897, inclusive, to the said conspirators or to some one of them, or to some person or corporation, for their benefit, except one small contract, No. 5359, for Savannah River near Augusta, let to Albert J. Twiggs, July 5, 1893, and as to this one exception the said Carter applied such stringent and unfair construction of the specifications as to make the performance of the contract ruinous to the contractor, and thus prevented him from any further competition with said conspirators. A list and the dates of said contracts so fraudulently let at high, exorbitant, and fraudulent prices, about 300 per cent. above the fair value of the same, for the benefit of said conspirators, from 1891 to 1897, inclusive, reference being had to the War Department file number, being as follows:

4,572, May 4, 1891, John F. Gaynor, contractor, improvement at Cumberland Sound.

27 4,637, July 20, 1891, W. H. Walsh, contractor, improvement at Fort Clinch.

4,655, Sept. 9, 1891, John F. Gaynor, contractor, improvement at Savannah River, Augusta.

4,820, Sept. 16, 1891, E. H. Gaynor, contractor, improvement at Cumberland Sound.

[17] 4,960, Oct. 22, 1892, Atlantic Contracting Co., contractor, improvement at Savannah Harbor.

4,963, Oct. 24, 1892, W. H. Walsh, contractor, improvement at Savannah River, Augusta.

5,127, Dec. 20, 1892, Atlantic Contracting Co., contractor, improvement at Darien Harbor.

5,133, Dec. 20, 1892, Atlantic Contracting Co., contractor, improvement at Altamaha River.

5,253, Mch. 1, 1893, Atlantic Contracting Co., contractor, improvement at Darien Harbor.

5,254, Mch. 20, 1893, Atlantic Contracting Co., contractor, improvement at Brunswick Harbor.

5,811, Nov. 15, 1894, Anson M. Bangs, contractor, improvement at Cumberland Sound.

6,049, Apr. 20, 1895, W. T. Gaynor, contractor, improvement at Darien Harbor, etc.

6,515, Oct. 8, 1896, Atlantic Contracting Co., contractor, improvement at Savannah Harbor.

6,517, Oct. 8, 1896, Atlantic Contracting Co., contractor, improvement at Cumberland Sound.

Under each and all of which contracts so fraudulently let the said Oberlin M. Carter, as such engineer officer in charge, in pursuance of said scheme to defraud the United States, allowed the said contractors to put in cheap and inferior material not in accordance with the specifications in the contracts and fraudulently exercised in favor of the contractors the options so fraudulently reserved to him in the specifications as engineer in charge. And under each of which
28 contracts the said Oberlin M. Carter, as such engineer officer in charge, in pursuance of said fraudulent scheme approved for payment, and paid whenever in funds as disbursing officer, the accounts of the said contractors for such work at the high, exorbitant, and fraudulent prices so provided in said contracts so fraudulently let.

VI.

The division of the money.

[18] Your orators further aver and charge that the profits of every one of said contracts so fraudulently let for the benefit of said conspirators, as aforesaid, from 1891 to 1897, inclusive, were divided from time to time between said conspirators.

(1) That in the division between Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter of the net profits of the contracts so fraudulently obtained prior to the contract No. 4820, of Sept. 16th, 1892, hereinbefore referred to, your orators are unable to state exactly what share was allotted and apportioned to the said Oberlin M. Carter, but your orator avers that amounts aggregating

$16,000 were traced with reasonable certainty from the profits of said contracts back into the possession of said Oberlin M. Carter, after he had, as disbursing officer, paid out the same on the contracts. How much more the said Carter may have been apportioned as his share of the profits on said prior contracts is to your orators unknown.

(2) Your orator avers and charges, however, that commencing with contract No. 4820, of September 16th, 1892, let in the name of Edward H. Gaynor, contractor, that after the payment of the cost of the work and after the payment to the other persons parties to the said fraudulent scheme, as aforesaid, the profits amounting to over two million dollars ($2,000,000), of all the aforesaid contracts so fraudulently let as aforesaid, were divided from time to time between Oberlin M. Carter, Benjamin D. Greene, and John F. Gaynor in three equal shares, one of which shares was apportioned to the said Oberlin M. Carter as his share of the profits arising from the consummation of said scheme to defraud the United States.

(3) That the said Oberlin M. Carter, as engineer officer in charge of said Savannah district, usually had funds to his credit as disbursing officer in the Merchants' National Bank of Savannah, Ga., or with the assistant treasurer of the United States at New York, intrusted to him by the Government for disbursement to con-
29 tractors on Government contracts, and when in funds during the operation of said fraudulent scheme in said Savannah district he usually paid the contractors at the beginning of each month for the amount of the vouchers ap|19|proved by him for the work of the preceding month, reserving 10 per cent. each month until the last payment on the contract.

That the better to secure his share in the fraudulent profits of the contracts it was usual for said Oberlin M. Carter, as such disbursing officer, to issue the checks for the monthly payments to the contractors in two batches. One batch was deposited in the local banks at Savannah and Fernandina and used in defraying the cost of the work and in payments to E. H. Gaynor and W. T. Gaynor and minor agents of the principal conspirators, and the other batch of checks representing the net profits would usually be taken by said Oberlin M. Carter in person to the city of New York, and the proceeds of said checks, after said Carter was paid therefrom $75 for an allowance for his trip to New York, would be divided between said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter, each getting a third, as aforesaid.

That sometimes said Oberlin M. Carter did not go on to New York and carry the disbursing checks there for division, but would send the checks to the said Benjamin D. Greene or John F. Gaynor, who would, at the direction of the said Oberlin M. Carter, pay over his third of the fraudulent profits, as aforesaid, to Robert F. Westcott (now deceased, the former father-in-law of said Carter), who would

invest it and turn over the investment to said Oberlin M. Carter, or otherwise dispose of it for the use and benefit of said Carter as said Carter directed.

(4) That although the work was authorized by act of Congress the money for payment of the bulk of the work under contracts of Oct. 8, 1896, No. 6515 for Savannah Harbor and No. 6517 for Cumberland Sound, let in the name of the Atlantic Contracting Company, contractor, was not available until July 1st, 1897. That by reason of the fact that all the profits of the previous contracts had been divided between the parties to the fraudulent scheme it became necessary that the parties interested should put up the money to carry on the work under these contracts of Oct. 8, 1896, until July 1, 1897, when the appropriation of money by Congress would be available, as the general plan of issuing disbursing checks monthly to carry on the work theretofore pursued could not be resorted to. To meet this necessity, on or about the first day of January, 1897, the said persons devising said scheme, as aforesaid, communi-
30 cated each with the other, and agreed among themselves that the said Benjamin D. Greene, John F. Gaynor, and Ober-[20]lin M. Carter would each respectively advance approximately one-third of the amount which it might be necessary from time to time to advance to carry on the work under said contracts until such time as the money appropriated by Congress for payment of the work under said contracts should become available. And it was then and there further agreed between said conspirators that all of the provisions of said scheme to defraud the United States, which had been in operation by and between the said parties in said district from 1891 to that time as aforesaid, should be applied in and to the execution and completion of the work under said contracts of October 8, 1896, which had been so fraudulently let as aforesaid, and in the obtaining of the money for the fraudulent accounts which should be rendered under said contracts to the said Oberlin M. Carter as such engineer officer in charge as aforesaid, and in the division of the said moneys between the said conspirators, except that the money so advanced by said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter to carry on the work should be repaid them before the division of the profits between them, as aforesaid. That in pursuance of the said scheme to defraud, so modified as aforesaid, the said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter did from time to time each advance moneys to carry on the work under said contracts of October 8, 1896, until July 1, 1897, when the appropriation by Congress became available.

And the said Oberlin M. Carter, as engineer, did approve accounts rendered by said conspirators in the name of the Atlantic Contracting Company for large amounts charged for cheap and inferior work not done in accordance with the specifications of the contracts, and at the high, exorbitant, and fraudulent prices at which said con-

tracts had been so fraudulently let, and did on or about July 6th, 1897, pay upon said accounts so approved by him the sum of $575,749.00, which said amount, less the deductions for moneys so advanced by said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter for carrying on the work and for the shares of the lesser conspirators and for advances to further carry on the work, was divided in thirds between the said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter.

And the said conspirators have continued to aid and abet each other to this day in their endeavor to obtain from the [21] United States additional moneys for work alleged to have been done under said contracts of October 8th, 1896, so fraudulently obtained at the exorbitant and fraudulent prices secured in said contracts by the operation of said scheme to defraud and for the cheap and
31 inferior material and work put into said construction under said contracts not in accordance with the specifications.

VII.

Greene's investments.

Your orators aver and charge that the following table gives in one column a statement of the dates when said divisions of the profits of said fraudulent contracts were so made by and between the said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter, by thirds as aforesaid, and in the next column gives at said respective dates said Benjamin D. Greene's share of the profits so fraudulently obtained from the United States on said contracts so fraudulently let and performed, as aforesaid, and the amount at each successive date is obtained by adding the previous shares so obtained by said Benjamin D. Greene, his share obtained at the respective date, so as to show his accumulated profits or the aggregate of his profits so fraudulently obtained at said respective dates. Like amounts having been likewise retained by the said Oberlin M. Carter and John F. Gaynor.

And your orators aver and charge that all of said profits so fraudulently obtained from the United States by the said Benjamin D. Greene, constitutes in the hands of the said Benjamin D. Greene and of all persons taking or holding the same, with notice of said fraud, a trust fund for the benefit of your orators. And that where said funds or proceeds of the same or any part thereof have been used in the purchase or acquisition of other property from innocent third parties, that the said trust follows the investment, and that said investments in the hands of *the* Benjamin D. Greene or other persons holding the same for him, or taking the same with notice of the fraud, constitutes a trust fund, and is held for the benefit of your orators.

32 *Table of the fraudulent profits retained by each of the three* [22] *chief conspirators.*

Number and dates of division.		Aggregate of thirds exclusive of $1,575 arbitrary allowance Carters's trips to New York.	Number and dates of division.		Aggregate of thirds exclusive of $1,575 arbitrary allowance Carters's trips to New York.
Number.	Date.		Number.	Date.	
	1903.			1894.	
2	Jan. 3	12,900.04	20	Nov. 12	450,586.02
3	Feb. 10	28,900.00	21	Dec. 11	458,865.93
4	Mch. 13	44,900.04		1895.	
5	Apl. 14	65,618.15	22	Jan. 17	468,507.59
6	May 8	80,618.15	23	Feb. 4	478,507.59
7	June 5	93,118.15	24	Mch. 5	485,578.47
8	July 11	129,118.15	25	Apl. 8	508,886.80
9	Aug. 7	142,118.15	26	May 22	517,981.83
10	Sept. 6	166,418.15	27	June 7	536,725.64
11	Oct. 10	178,418.15	28	July 5	582,256.33
12	Nov. 6	184,418.15	29	Aug. 5	589,666.32
13	Dec. 4	205,418.15	30	Sept. 3	589,802.92
	1894.			1896.	
14	Jan. 8	221,918.15	31	May 12	595,836.36
15	Feb. 5	239,918.15		1897.	
16	Mch. 5	247,918.15	32	July 6	722,528.03
17	July 9	277,536.02			
18	Sept 10	419,586.02			
19	Oct. 5	440,586.02			

O. M. Carter's share	$722,528.02
B. D. Greene's share	722,528.03
J. F. Gaynor's share	722,528.03

33 [23] Your orators file herewith as Exhibit E a table setting forth the fraudulent profits of the aforesaid contracts, which were divided by thirds between Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter, and the aggregate amounts thereof retained by said Benjamin D. Greene out of the divisions so made, to which the usual leave of reference is prayed.

Your orators file herewith as Exhibit F a table setting forth certain of the proceeds of said fraudulent profits from the share of the same retained by said Benjamin D. Greene, aggregating $113,926.55, which have been traced into the possession of the said Luther Laflin Kellogg, to which table the usual leave of reference is prayed.

VIII.

The board of inquiry.

(1) Your orators further aver and charge that it having been determined by the new Chief of Engineers, General John M. Wilson, who succeeded to that office about February, 1897, to make a general change of the officers in the Corps of Engineers from one district to another for the general good of the service, and that fact becoming known to the said Oberlin M. Carter, he succeeded in causing himself to be appointed as military attache to the Court of St. James and also as a member of the Nicaragua Canal Commission, and the said O. M. Carter being superseded as engineer officer in charge of the Savannah district on July 17, 1897, his successor,

Captain Cassius E. Gillette, took charge of the district July 20th, 1897.

Within two weeks after taking charge of the Savannah district facts began to come to the attention of Captain Gillette showing irregularities in the administration by said Carter of the affairs of the district of the gravest character.

It was developed that a large number of the official files and documents of the office had been, with a great deal of his private papers, packed up by Carter in a file case, which he caused to be boxed and which he directed to be shipped to him. This box was detained.

This state of affairs led to the appointment by the President of a board of inquiry, of which Colonel George L. Gillespie (now General Gillespie) was president.

In the meantime the said Oberlin M. Carter hurried back from England. Arriving in New York City early in September, 1897, said Carter expected to be arrested and took out of [24] his safety deposit box securities of the cost value of $414,437.50, which he had there, constituting a part of the investments which he had
34 made from his share of the illegal profits of the contracts as aforesaid, and turned them over to the said Benjamin D. Greene and John F. Gaynor at the Hoffman House for safe keeping.

These securities were in a day or two delivered by said Benjamin D. Greene to the said Robert F. Westcott for safe keeping for said Carter, and Westcott placed them in his safety deposit vault. Shortly thereafter the facts in regard to Carter's guilty connection with said Benjamin D. Greene and John F. Gaynor in the contracts began to be given publicity in the newspapers, and the said Robert F. Westcott, upon the advice of his counsel and in the presence of his counsel, delivered back to Carter all of the aforesaid securities so turned over to Westcott by said Greene, and took said Carter's receipts for the same in detail, which receipts are dated, respectively, October 11, 1897, and October 29, 1897, and which original receipts came to the knowledge and into the possession of your orators on or about the month of July, 1900, and are held subject to the inspection of the court.

Your orators further aver and charge that said board of inquiry appointed to inquire into the propriety of court-martial proceedings met in Savannah on September 21, 1897, and the said detained file case was opened by the said Oberlin M. Carter in the presence of said board, and in it were found a large mass of incriminatory evidence tending to show conspiracy between the said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter in such contract work aforesaid in Savannah district, and showing that said Carter's personal expenditures had run up from about $4,300 per annum in 1890 to $28,611.67 in 1896, as hereinbefore set forth, showing that the income so spent by said Carter was derived from a large amount of securities which Carter was handling during said period. And said Carter, in order to explain his possession of said securities and his spending of the income from the same, caused the said Benja-

min D. Greene and said John F. Gaynor to come before said board and make statements in his presence to the effect that neither the said Oberlin M. Carter nor the said Robert F. Westcott had been in any way beneficially interested in any of said contracts let in said Savannah district, [25] and the said Carter himself made before the said board a like statement, and further stated that the large income so spent by said Carter from securities was from gifts given him by the said Robert F. Westcott, his former father-in-law, from the private fortune of said Westcott, to whom the securities belonged and in which Carter had no interest. Your orators further aver and charge that after due investigation said board of inquiry recommended the convening of a court martial to try said Oberlin M. Carter on the charge, among other things, of conspiracy with the said Benjamin D. Greene, John F. Gaynor, and others to defraud the United States, as hereinbefore set forth, although at that time the details by which the said conspiracy was carried out and the money divided between the conspirators, as hereinbefore set forth, was not fully known.

The court martial.

(2) Your orators further aver and charge that in due course a court martial was duly constituted and convened at Savannah on the 12th day of January, 1898, of which General Elwell S. Otis was president, and the other members being all disinterested engineers or officers distinguished in other branches of the military profession. The trial of Captain Carter before this court martial on the charges was continued through three months and attracted more attention and was given greater publicity through the newspapers and otherwise than any other similar event in the history of the country, and the details of the evidence, published every day in almost every important newspaper throughout the United States, give a notoriety to the facts in issue in the case such as probably no similar case has ever had.

Before this court martial the said Carter and the said Benjamin D. Greene were volunteer witnesses in behalf of said Carter, and again stated that neither said Robert F. Westcott nor the said Carter had been interested beneficially in said contracts and that the said securities handled by said Carter were the securities belonging to the private fortune of the said Robert F. Westcott, which said Carter had no personal interest, but the income from which had been given him by said West[26]cott. Your orators further aver on information that the said Oberlin M. Carter endeavored to induce the said Robert F. Westcott to appear before said court martial and testify falsely to the same effect, but the latter, while he did not desire to testify against the husband of his dead child, would not consent to go upon the stand otherwise than to tell the truth of the transaction and to disclaim any interest in these securities and investments. To avoid testifying against his said son-in-law said Robert F. Westcott departed to Europe and remained away during the court martial proceedings.

Your orators further aver and charge that, by reason of the fact that the said court martial had no power to compel civilian witnesses to testify and no power to compel such witnesses to produce books and papers, the evidence before the said court martial did not develop the particular divisions of the money paid on said contracts between the conspirators, nor trace and locate the
36 specific funds so divided into specific securities, as has since been done and set forth in this bill. Nevertheless the evidence of conspiracy to defraud the United States, entered into between the said conspirators in the letting of the contracts and the doing of the work under them, and the possession by Carter of so large an amount of securities from which he was enjoying the income without any satisfactory explanation, furnished proof so plain of the guilt of said Oberlin M. Carter that he was convicted by said court martial and sentenced to dismissal from the Army, to pay a fine of $5,000, and to be imprisoned at hard labor for five years.

The firm of Kellogg, Rose & Smith, of which the said L. Laflin Kellogg was a member, were of counsel for said Oberlin M. Carter in said court martial proceedings; and by and through said court martial proceeding said Kellogg had full notice of the said fraud.

The appeal.

(3) Your orators further aver and charge, that an appeal was made by said Oberlin M. Carter to the President of the United States to review the judgment of the said court martial. That on account of the pressure of public business consequent upon the pendency of the War with Spain, there was some delay in the disposition of said appeal, and the Attorney General to whom a review of the evidence was referred by the President, [27] did not reach a conclusion confirming said judgment until about the 29th day of September, 1899, and this was followed by the confirmation of the judgment by the President, following which the said Oberlin M. Carter was placed in confinement, and after so preliminary efforts made by him to obtain release by habeas corpus proceedings conducted by the said firm of lawyers of which said Kellogg was a member, he was imprisoned in said penitentiary at Fort Leavenworth, Kansas.

The indictment of Greene and the Gaynors, et al.

During the pendency of said appeal such original documents and evidence throwing light upon the frauds committed as aforesaid were in the possession of the President or the Attorney General for him. As soon as the said appeal was disposed of the said evidence was turned over to the district attorney for the southern district of Georgia, who forthwith proceeded to put said evidence before the grand jury for said district, and on the 8th day of December, 1899, said grand jury returned a true bill of indictment against the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor,

37 Edward H. Gaynor, Michael A. Connolly, and Oberlin M. Carter, charging them with conspiracy to defraud the United States by and through said scheme to defraud, as substantially set forth in this bill.

The hearing for removal.

(4) The said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor were arrested in New York City on December 11th, 1899, on warrants issued by John A. Shields, United States commissioner for the southern district of New York, based upon said indictment and affidavit thereto, and being in due course identified by evidence as the defendants therein, were committed in default of bail to await a warrant of removal from his honor, Judge Addison Brown, the district judge, to Georgia for trial. The judge, who held the matter under advisement some months, on June 26th, 1900, made an order referring the case back to the commissioner to take evidence on the merits as to the guilt or innocence of the accused for the purpose of establishing probable cause of guilt.

On July 6th, 1900, the hearing was renewed before Com[28]missioner Shields, and with some short recess was proceeded with, and a large amount of oral and documentary evidence on all features of the case was put in on both sides, and until December 23, 1900, when the case was submitted to the commissioner for his finding on the evidence, on March 21, 1901, the commissioner, who had the voluminous record under consideration in the meantime, made his finding of probable cause of guilt, and again committed said defendants into custody for removal to Georgia for trial.

On the 23rd day of May, 1901, his honor, Judge Brown, made an order affirming the finding of said commissioner, and directed the removal of the said defendants to Georgia for trial.

Your orators further aver and charge that while said hearings were being proceeded with your orator's agents and attorneys, by great labor and strenuous efforts, were enabled through the greater effectiveness of the processes of the civil courts to obtain a large amount of documentary and other evidence from banks, brokers, and others, unknown to your orators until then, demonstrating the division of the fruits of the said fraudulent scheme between the said conspirators, as set forth in this bill.

The said Robert F. Westcott, too, has returned to the United States, and the case against his son-in-law, Carter, having been ended by his imprisonment under sentence in the penitentiary, expressed his willingness to testify as against the other conspira-
38 tors to the facts within his knowledge and turn over to the Government all his checks, check books, and documents bearing upon questions in issue. This the said Westcott did, and it was found by the Government's expert accountant, as testified to at said hearing, that while a considerable part of the proceeds of said divisions of the profits of said contracts had passed through said Westcott's hands, and while a large part had been handled through the

banks in Westcott's name under powers of attorney held by said Carter, that said Westcott had retained no part of the same, but that the same or the investment of the same almost immediately after division found its way into the possession of said Oberlin M. Carter, who proceded to enjoy the income therefrom.

Your orators aver and charge that the said firm of Kellogg & Rose (the former partner, Arthur H. Smith, having retired) represented as attorneys all of the defendants in the said removal proceedings in New York. The said Kellogg having [29] taken a personal part therein in the examination and cross examination of witnesses and in the general conduct of the proceedings. That in the conduct of said removal proceedings the said Kellogg & Rose admitted in judicio that the proof had established the fact that the profits of said contracts had been divided in thirds, one-third to said Benjamin D. Greene, one-third to said John F. Gaynor, and the other third, in large part, they admitted had gone indirectly to the said Oberlin M. Carter, through an account kept in bank in the name of said R. F. Westcott, from which account said Oberlin M. Carter withdrew the deposits under a power of attorney held by him from said Robert F. Westcott while the latter was absent in Europe.

And that the said Kellogg & Rose therein claimed in judicio that said evidence showed that the said R. F. Westcott was a partner with the said Greene and Gaynor in the said Government contracts in the Savannah district. But further claimed that the gift of such proceeds of the contracts by said Westcott to said Oberlin M. Carter was not a crime.

And in so making said claim the said Kellogg & Rose had full notice that the said Greene, the said Gaynor, and the said Carter had all, in said board of inquiry and court martial proceedings, denied that said Robert F. Westcott was at any time interested in said contracts as a partner with said Greene and Gaynor or otherwise.

By reason of the aforesaid removal proceedings your orators aver that the said L. Laflin Kellogg was likewise put on full notice of the fraud complained of in this bill.

Your orators aver and charge that in order to prevent your orators from recovering from the said Benjamin D. Greene the
39 large amount of investments into which he had diverted the said money of the United States so fraudulently obtained the said Benjamin D. Greene set about concealing the same by making other people the holders thereof but secretly for his benefit, and your orators aver and charge, on information and belief, that among the assets so concealed were and are the assets described on Exhibit F hereto, as received and handled by the said L. Laflin Kellogg for account of the said Greene, and particularly the said 400 shares of the common stock of the Norfolk and Western Railway Company, certificate numbers 5896, 5897, 5898, 11077, 74200, which shares still stand in the name [30] of the said Laflin L. Kellogg on the books of said railway company. And your orators aver and charge that all of said assets described in Exhibit F were so received by the

said L. Laflin Kellogg with full notice of the fraud set forth in this bill and with full notice that by reason of said fraud the said assets were held by the said Benjamin D. Greene as a trust fund for the benefit of your orators. And your orators aver that the said Kellogg still holds the same, or a very large part thereof, and is accountable to your orators therefor, in this proceeding. And especially does the said L. Laflin Kellogg hold the said 400 shares of the common stock of the said Norfolk and Western Railway, the locus of which is within the territorial jurisdiction of this court.

IX.

Forasmuch as your orators can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can show why your orators should not have the relief hereby prayed for and full, true, direct, and perfect answers make to the matters hereinbefore stated and charged, but not under oath, answers under oath being hereby expressly waived, your orators pray as follows:

(1) That this court will forthwith appoint a temporary receiver to take charge of the aforesaid property within the jurisdiction of this court as hereinbefore set forth until a hearing can be had on rule nisi to be issued in this cause.

And that the court will grant a temporary restraining order restraining the defendants from transferring the said properties or their proceeds or income until a hearing can be had.

(2) That in due course such receiver shall be appointed pendente lite.

40 (3) That the court will in due course by its final decree declare all of the aforesaid investments within the jurisdiction of the court, into which the funds so intrusted to said Oberlin M. Carter as disbursing officer and so fraudulently diverted to the use of said Benjamin D. Greene as aforesaid, in the hands of the defendants and of all persons holding the same for the benefit of said Benjamin D. Greene, or taking the same with notice of the fraud, are together with the income properties held in trust for orators, and will decree a delivery of the [31] same or proceeds thereof to your orators or a conveyance of the same to your orators, or a sale of the same, and the delivery of the proceeds to your orators as the nature of the case and justice may require.

And that your orators may have a personal judgment against the said L. Laflin Kellogg for the amount of all of said trust funds traced to him which he may fail to account for.

(4) That the court will grant a restraining order and injunction in due course restraining any and all parties to this suit, their agents and attorneys from in any manner conveying away, disposing of, or incumbering pendente lite any of the properties described on Exhibit F to this bill, or the proceeds of the re-investments thereof.

(5) That whenever other and additional persons within the jurisdiction of this court shall become known holding with notice of the fraud any of said properties into which said fund so intrusted to

said Oberlin M. Carter, as disbursing officer, has so fraudulently been diverted, and the details of the concealment of said properties shall have been sufficiently developed that your orators may be allowed to make them parties hereto by suitable amendment with apt allegations and prayers.

(6) May it please your honors to grant unto your orators the court's most gracious writ of subpœna, directed to the said Benjamin D. Greene, at present residing in the city of Quebec, Canada, to the said Luther Laflin Kellogg, residing in the city and State of New York, and to the Norfolk and Western Railway Company, a corporation having its principal office in the city of Roanoke, Virginia.

(7) Inasmuch as the defendants Benjamin D. Greene and Luther Laflin Kellogg are not to be found in the territorial jurisdiction of this court, your orators pray that the court will make a suitable order for service upon them by publication in accordance with the statute in such case made and provided.

41 May it please your honors to grant unto your orators such other and further relief as the nature of their case may require and to the court may see meet and appropriate.

MARION ERWIN,
Special Asst. to the Atty. Genl.
THOS. L. MOORE,
U. S. Atty. for Western Dist. of Va., Complainant's Solicitor.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

[32] On this 17 day of December, 1903, before the undersigned personally comes Edward I. Johnson, who being duly sworn, deposes and says that he is a bank examiner by profession; that he has for four years and over been engaged, under employment by the United States in working out through the accounts and documents in the engineer's office for the Savannah district, and the accounts of Oberlin M. Carter, Benjamin D. Greene, John F. Gaynor, R. F. Westcott and others, in the banks and brokers' offices in New York and elsewhere, the details of the fraud set forth in the foregoing bill; that he has read the testimony of the witnesses in the court-martial proceedings therein referred to, and in the proceedings for removal of Benjamin D. Greene et al., therein referred to, and he has read the said bill and is familiar with the facts set forth in said bill, and that the facts therein stated are true to the best of his knowledge, information, and belief.

EDWARD I. JOHNSON.

Subscribed and sworn to before me the 17 day of Dec., 1903.
[SEAL OF NOTARY.] FREDERICK L. CAMPBELL,
Notary Public, Kings County.

Frederick L. Campbell, notary public, Kings Co., 151. Cert. filed in N. Y. Co.

Endorsed: In the Circuit Court of the United States for the Western District of Virginia. The United States of America vs. Benja-

min D. Greene et al. In Equity. Bill, etc. 1903, December 19th filed, W. M. Mauzy, D. C. Bill. Marion Erwin, Special Assistant Attorney General, solicitor for complainant. Thos. L. Moore, U. S. Atty. for Western Dist. of Virginia, of counsel.

42 [33] EXHIBIT E.

Table showing fraudulent profits of contracts divided by thirds between Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter and the aggregate of amounts thereof retained by Benjamin D. Greene.

Contract on which paid.		How divided.				
Number of contract.	Name of contractor.	Amount paid on Carter's disbursing checks divided by thirds.	Number of division.	Date of division.	Share of division retained by B. D. Greene.	Aggregate of amounts retained by B. D. Greene.
4820	Edward H. Gaynor	38,700.12	2	Jany. 3, 1893	12,900.04	12,900.04
4960	Atlantic Contracting Co.					
4820	Edward H. Gaynor	48,000	3	Feby. 10, 1893	16,000	28,900.04
4960	Atlantic Contracting Co.					
4820	Edward H. Gaynor	48,000	4	Mch. 13, 1893	16,000	44,900.04
4960	Atlantic Contracting Co.					
5133	.....do.					
4960	Atlantic Contracting Co.	62,154.34	5	Apl. 14, 1893	20,718.11	65,818.15
5127	.....do.					
4820	Edward H. Gaynor	45,000	6	May 8, 1893	15,000	80,618.15
4960	Atlantic Contracting Co.					
5127	.....do.					
5133	.....do.					
4820	Edward H. Gaynor	37,500	7	June 5, 1893	12,500	93,118.15
4960	Atlantic Contracting Co.					
4960	Atlantic Contracting Co.	108,000	8	July 11, 1893	36,000	129,118.15
5253	.....do.					
5254	.....do.					
4960	Atlantic Contracting Co.	39,000	9	Aug. 7, 1893	13,000	142,118.15
4960	Atlantic Contracting Co.	72,900	10	Sept. 6, 1893	24,300	166,418.15
4960	Atlantic Contracting Co.	36,000	11	Oct. 10, 1893	12,000	178,418.15
4960	Atlantic Contracting Co.	18,000	12	Nov. 6, 1893	6,000	184,418.15
4960	Atlantic Contracting Co.	63,000	13	Dec. 4, 1893	21,000	205,418.15
4960	Atlantic Contracting Co.	49,500	14	Jany. 8, 1894	16,500	221,918.15
4960	Atlantic Contracting Co.	54,000	15	Feby. 5, 1894	18,000	239,918.15
4960	Atlantic Contracting Co.	24,000	16	Mch. 5, 1894	8,000	247,918.15
43 4960	Atlantic Contracting Co.	88,853.61	17	July 9, 1894	29,617.87	277,536.02
4960	Atlantic Contracting Co.	426,150	18	Sept. 10, 1894	142,050	419,586.02
4960	Atlantic Contracting Co.	63,000	19	Oct. 5, 1894	21,000	440,586.02
4960	Atlantic Contracting Co.	30,000	20	Nov. 12, 1894	10,000	450,586.02
4960	Atlantic Contracting Co.	24,839.73	21	Dec. 11, 1894	8,279.91	458,865.93
5811	Anson M. Bangs					
4960	Atlantic Contracting Co.	28,925	22	Jany. 17, 1895	9,641.66	468,507.59
4960	Atlantic Contracting Co.	30,000	23	Feby. 4, 1895	10,000	478,507.59
5811	Anson M. Bangs	21,212.65	24	Mch. 5, 1895	7,070.88	485,578.47
4960	Atlantic Contracting Co.	69,925	25	Apl. 8, 1895	23,308.33	508,886.80
5811	Anson M. Bangs					
4960	Atlantic Contracting Co.	27,285.08	26	May 22, 1895	9,095.03	517,981.83
5811	Anson M. Bangs					
4960	Atlantic Contracting Co.	56,231.43	27	June 7, 1895	18,743.81	536,725.64
5811	Anson M. Bangs					
4960	Atlantic Contracting Co.	136,592.08	28	July 5, 1895	45,530.69	582,256.33
5811	A'son M. Bangs					
6049	Wm. F. Gaynor					
4960	Atlantic Contracting Co., Capt. G. W. Goethal's check	22,229.97	29	Aug. 5, 1895	7,409.99	589,666.32
4960	Atlantic Contracting Co., Capt. G. W. Goethal's check	409.80	30	Sept. 3, 1895	136.60	589,802.92
4960	Atlantic Contracting Co.	18,100.31	31	May 12, 1896	6,033.44	595,836.36
6515	Atlantic Contracting Co.	380,075	32	July 6, 1897	126,691.67	$722,528.03
6517	.....do.					

Indorsed: In the Circuit Court of the United States for the Western District of Virginia. The United States of America vs.

Benjamin D. Greene et al. Bill, &c. Exhibit E to the bill. 1903, December 19th, filed. W. M. Mauzy, D. C. Marion Erwin, Sp. Asst. Atty. Genl.

44 [34] EXHIBIT F.

Certain receipts and reinvestments by L. Laflin Kellogg of funds derived from the securities bought or redeemed by Benjamin D. Greene with diverted funds as per Exhibit E (divisions No. 2 to 32, inclusive) or the proceeds of the reinvestments thereof.

CHECKS RECEIVED, SECURITIES SOLD, AND DIVIDENDS COLLECTED.

Date of transaction.	Name of broker through whom transaction made.	Description of transaction.	Amount of proceeds.
October 12, 1898	Lee Livingston & Co., New York.	Check of Lee Livingston & Co., drawn on Com. Exchange Bank, New York, No. 19264, dated October 12th, 1898, payable to the order of B. D. Greene and transferred to L. Laflin Kellogg.	5,000
October 1899	Lee Livingston & Co., New York.	Check of Lee Livingston & Co., drawn on Com. Exchange Bank, New York, No. 24194, dated October 4, 1899, payable to the order of B. D. Greene and transferred to L. Laflin Kellogg.	15,783.80
March 23, 1900	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, 400 shares Delaware, Lackawan'a & Western Railway Company stock, numbers 122324 to 122327, inclusive.	35,791.50
March 23, 1900	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, 600 shares Canada Southern Railway Company stock, numbers 24865 to 24873, inclusive.	29,724.50
March 26, 1900	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, 100 shares Canada Southern Railway Company stock, number 24874.	4,958.25
April 6, 1900	A. W. Kilborne & Co., New York.	Collected through A. W. Kilborne & Co., for account of L. Laflin Kellogg, April, 1900, dividend on 200 shares Southern Railway preferred stock.	300
July 27, 1900	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, $3000. Bonds Missouri, Kansas & Texas Railway 2nds 4%, numbers 16533, 15630, 16193, 15815, 15362.	3,443.75
October 16, 1900	A. W. Kilborne & Co., New York.	Collected through A. W. Kilborne & Co., for account L. Laflin Kellogg, October, 1900, dividend on 200 shares Southern Railway preferred stock.	300
November 1, 1900	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, $3000. Bonds Missouri, Kansas & Texas Railway 2nds 4%, numbers 15154, 14989, 15118.	1,983.75
April 9, 1901	A. W. Kilborne & Co., New York.	Collected through A. W. Kilborne & Co., for account of L. Laflin Kellogg, April, 1901, dividend on 200 shares Southern Railway preferred stock.	400
April 10, 1901	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, 200 shares Southern Railway preferred stock, numbers 21319, 21320.	15,746
July 16, 1901	A. W. Kilborne & Co., New York.	Collected through A. W. Kilborne & Co., for account of L. Laflin Kellogg, July, 1901, dividend on 490 shares Norfolk & Western Railway Company common stock.	485.10
October 8, 1901	A. W. Kilborne & Co., New York.	Collected through A. W. Kilborne & Co., for account of L. Laflin Kellogg, July, 1901, dividend on 10 shares Norfolk & Western Railway Company common stock.	9.90

[34] EXHIBIT F—Continued.

Certain receipts and reinvestments by L. Laflin Kellogg of funds derived from the securities bought or redeemed by Benjamin D. Greene, etc.—Continued.

REINVESTMENTS OF PROCEEDS BY L. LAFLIN KELLOGG.

Date of reinvestment.	Name of broker through whom reinvestment made.	Description of securities bought.	Numbers.	Par value.	Cost.
March 23, 1900	A. W. Kilborne & Co., New York, for account of L. Laflin Kellogg.	1,000 shares Canada Southern Railway Company stock.	24304, 28383, 24384, 24434, 24476, 24478, 24591, 24655, 24701, 24870.	100,000	$51,775
	Transferred into the following numbers and delivered to L. L. Kellogg June 26, 1900.		25062 to 25071, inc.		
March 26, 1900	A. W. Kilborne & Co., New York, for account of L. Laflin Kellogg.	500 shares Norfolk & Western Railway Company's common stock.	100, 100, 100, 2368, 2369, 2370, 100, 10, 25, 298, 10427, 9857, 3, 62, 10225, 5885.	50,000	18,812.50
	Transferred into the following numbers and delivered to L. L. Kellogg July 17, 1901, & Nov. 5, 1901.		100, 100, 100, 100, 5895, 5896, 5897, 5898, 90, 10, 11077, 74200.		

Indorsed: In the Circuit Court of the United States for the Western District of Virginia. The United States of America vs. Benjamin D. Greene et al. Bill, &c. Exhibit F to the bill. 1903, December 19th, filed. W. M. Mauzy, D. C. Marion Erwin, Sp. Asst. Atty. Genl.

45 In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE ET AL. } In Equity.

[35] The answer of the Norfolk and Western Railway Company, one of the defendants to the bill of complaint of the United States of America, plaintiff:

This defendant, the Norfolk and Western Railway Company, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says:

1. As to the averments of the sections of the bill numbered I, II, III, IV, V, and VII, this defendant has no knowledge or information sufficient to form a belief, and if deemed material requires proof of the same.

2. As to the averments of the section of the bill numbered VIII, this defendant has no knowledge or information sufficient to form a belief except that this defendant admits that 400 shares of the common stock of the Norfolk and Western Railway Company and

avers that certificates No. C5896, C5897, C5898, 11077, and X74200 were issued, stands on the books of the company, this defendant, in the name of L. Laflin Kellogg.

3. This defendant is not a party to the controversy bewteen the United States as complainant and the other defendants herein as to the title to the above mentioned 400 shares of this defendant's common stock, but submits itself to such order or decree as to this court may seem meet in said cause and requests that when final order is entered, or at such time as the court may deem appropriate, this defendant be allowed its reasonable costs herein.

NORFOLK AND WESTERN RAILWAY COMPANY,
By L. E. JOHNSON, *President.*

Attest:
[SEAL.]
A. J. HEMPHILL, *Secretary.*
F. S. KIRKPATRICK,
Counsel for N. & W. Ry. Co.

46 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

[36] L. E. Johnson, being duly sworn according to law, deposes and says that he is the president of the Norfolk and Western Railway Company, and that the facts stated in the foregoing answer in this cause are true.

L. E. JOHNSON.

Sworn and subscribed before me this 27th day of January, A. D. 1904.

[SEAL OF NOTARY.]
HARRY M. KURTZ,
Notary Public.

Commission expires February 27th, 1905.

Endorsed: U. S. America vs. Green. Answer of Norfolk & Western Ry. Co. Filed March 18, 1904. Wm. McCauley, clerk.

In the Circuit Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA
v.
BENJAMIN D. GREENE, L. L. KELLOGG, AND THE Norfolk & Western Railway Company. } Demurrer.

[37] The separate demurrer of L. L. Kellogg, one of the defendants above named to the bill of complaint of the United States of America, exhibited against him and others in the Circuit Court of the United States for the Western District of Virginia.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainants' bill contained to be true in such manner and form as the same are therein set forth and alleged (or otherwise), says that the same is not sufficient in law to

justify or sustain the relief therein sought for in any respect, and for assignment of grounds of demurrer, he says:

I. According to the statement of the bill there is merely a common law claim against the defendant, Benjamin D. Greene (alone),
47 for money had and received, which, if it have any merit, may be asserted at common law, and it is therefore not a matter of equitable cognizance at all.

II. If the plaintiffs have any right to the shares, and the title of this defendant is invalid as the bill charges, there is a plain remedy by action at law, and resort to equity is inadmissible.

III. According to the statement of the bill, the co-defendant, Greene, was in no sense a bailee of funds, but merely a debtor to the plaintiff, and when he collected his pay check, howsoever excessive, and converted it into money, he held it by absolute title, and it is not susceptible of being earmarked or followed into other hands, or made the object of claim in the hands of third parties.

IV. No trust can be created in money except to the extent of the indebtedness of a party standing in the attitude of a [38] garnishee to the principal debtor, and tho the bill states inferentially that Greene owned the stocks mentioned in Exhibit F, he evidently purchased them with money in which his title was unimpeachable, the stocks cannot be followed when he transfers those.

V. The bill is fatally defective in not charging that this defendant came illegally or male fide into possession of the 400 shares of Norfolk & Western stock mention' in Exhibit F.

VI. The bill does not allege explicitly, and exclude the conclusion, that the defendant is a bona fide purchaser for value of the said Norfolk & Western stock.

VII. The bill does not negative or exclude the conclusion that the said Norfolk & Western stock was delivered to this defendant bona fide in discharge of an obligatiton before notice, suspicion, or knowledge of the alleged fraud of Greene.

VIII. The said Norfolk & Western stock, according to the allegations of the bill, could not be held by Greene "as a trust fund for the benefit of" the complainants.

IX. The said stock, according to the averments of the bill, can not be held by this defendant so as to be "accountable to" the complainants.

X. The bill does not aver that each and every of the various
48 dollars paid to Greene were fraudulently obtained by him, and belonged to the plaintiff, but leaves the conclusion that to some of the money paid him, or money from other sources, had good title in law and morals.

XI. The bill does not specifically charge that the particular 400 shares of Norfolk & Western stock within the jurisdiction of this court and the object of this suit were acquired by fraudulent profits or stolen funds, and does not exclude the conclusion that they were acquired by funds honestly belonging to the said Greene. It does not allege that Greene did not have other money honestly obtained.

XII. The bill does not offer to do equity by allowing the said Greene that to which under a quantum meruit he would be entitled.

XIII. The bill does not offer to do equity by allowing this defendant to claim and retain what he is fully entitled to.

XIV. The bill shows that the complainants have no inter[39]est whatsoever in the subject matter involved, the Norfolk & Western stock, and that they are not entitled to implead this defendant in respect thereto.

XV. The bill is defective in not averring that Greene is insolvent, and unable to pay the plaintiff's debt, and has no assets of his own sufficient to pay.

XVI. It alleges no demand upon, and refusal by, Greene.

XVII. It alleges no demand upon, and refusal by, the defendant.

XVIII. Tho it is alleged in the bill (p. 40) that the stock was received by this defendant with full knowledge of the fraud of "the conspirators," Greene and others, it does not follow that it was held by Greene as a trust fund for the complainants; the fundamental statements of the bill show the reverse.

XIX. The bill does not charge this respondent with intentional fraud.

XX. The bill asks orders restraining the alienation of property, and is fatally defective in not alleging that such alienation would work irremedial loss, or gross injustice, not susceptible remedy in damages.

49 Wherefore, and for divers other good causes, this defendant prays judgment whether he shall be required to make any other or further answer to the said bill.

And he prays to be hence dismissed with his reasonable costs in this behalf sustained.

L. LAFLIN KELLOGG, p. d.

Certificate.

I, John H. Lewis, of counsel for the defendant, L. L. Kellogg, respectfully certify that in my opinion this demurrer is well founded in point of law.

Given under my hand this 3rd day of March, 1904.

J. H. LEWIS.

Affidavit.

I, L. Laflin Kellogg, the defendant above named, being duly sworn, do depose and say that the foregoing demurrer is not interposed for the purpose of delay.

L. LAFLIN KELLOGG.

Subscribed and sworn to before me this 5th day of March, 1904.

[SEAL OF NOTARY.] MACINTOSH KELLOGG,
Notary Public, New York County.

[40] Endorsed: United States v. Greene and others. Demurrer of L. I. Kellogg. 1904, March Rules, filed (March 7th). W. M. Mauzy, D. C.

In the Circuit Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA
v.
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, AND THE Norfolk & Western Railway Company. } Answer.

[41] The separate answer of L. L. Kellogg to a bill of complaint exhibited against him and others by the United States of America in the Circuit Court of the United States for the Western District of Virginia.

50 This respondent, L. L. Kellogg, not waiving his demurrer by him heretofore filed, but insisting on the efficiency thereof to dispose of all claim asserted or capable of being asserted against him by the said complainant in the said bill, or otherwise, and saving and reserving unto himself the benefit and advantage of all and all manner of exceptions which can or may be had or taken to the manifold errors, uncertainties, and insufficiencies in the said bill contained, for answer thereto, or to so much and such parts thereof as he is advised it is material he should make answer, answering, says:

I. That this answer is made under oath and is intended to be used at once as an answer, and in season as an affidavit in any sort of proceedings.

II. That he is informed and believes that all the fundamental and material allegations of the said bill are untrue.

[42] III. That he has been informed and believed, and now does believe that the contracts specified or mentioned in the bill of complaint were properly obtained, and properly and carefully executed in accordance with the specifications, and that the complainants received from the contractors full value for every dollar it paid them on account of said contracts.

IV. That he has been informed by all the parties charged in the bill with having entered into a conspiracy, except Connolly, whom he never saw, that there was no conspiracy, as alleged in said bill to defraud the United States, or of any other kind; but that the work done by the contractors under the several contracts was properly performed, and that the amount paid was only the stipulated amount mentioned in the contracts.

V. The respondent further says, upon his oath, that the charges in the bill, of knowledge of respondent of any such fraud as alleged or pretended to be alleged in the bill in relation to the making of the contracts, or their execution, is false and untrue; but he affirms that he has never at any time, nor has he now any such knowledge or notice.

That after these preliminary general denials, which this defendant desires to be made and taken as broad and comprehensive as possible, respondent will take up the specific allegations of the bill, and as to them he says:

VI. That he has information and believes that the first paragraph of the bill, as it appears on page 2 under the heading
51 "Carter's duties, powers, and discretions," in so far as it states who Carter was and what his business was during the time therein mentioned, is true.

VII. That with reference to the specifications of his powers, duties, and discretions following such general statement, respondent says:

[43] That he is informed and believes the following facts are true, namely: That Carter did have certain duty with reference to proposing to his superiors, projects for the improvement of rivers and harbors; with reference to proposing projects for the expenditure of moneys for such improvements; with reference to devising and drafting specifications for contracts for such improvements; with reference to drafting and proposing forms of advertisements; giving notice that bids would be received; with reference to proposing to his superiors, as part of the specifications, the time within which the successful bidder should be required to commence work; and with reference to suggesting to his superiors modifications of contracts.

That with reference to each and every one of the last-mentioned items his power and duty was solely to suggest to his superiors or to propose to them the various matters therein specifically set out.

That in the case of each and every contract mentioned herein Carter performed such duty; that with regard to the project for improvement, project for expenditure, specifications for contracts, the form of advertisements, the fixing of the time when work should begin, and the modification of contracts, every act of Carter, with reference to each and every one of the contracts mentioned in the bill was approved by his superior officer and directions given to him to execute the same, and that the failure on his part to comply with such direction (which was equivalent to a military order) would have rendered him liable to be court martialed.

That each of these contracts was let upon specifications approved by Carter's superior officers, either the Chief Engineers of the Secretary of War, after advertisement in the form fixed by the Chief Engineers of the Secretary of War, and for the time and in the papers ordered and directed by the superior officers of said Carter.

[44] The defendant is informed and believes the statement to be untrue, and he denies that Carter had power, duty, and discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids, as alleged in the bill; and, on the contrary, states the fact to be, that he was
52 required by the rules and regulations to send the form of advertisement and a statement of what papers it would be published in, and the number of times that the publication would be had, to his superior officers, for their approval, and that in each and every case of the contracts mentioned in the bill that this was done, and the advertisement was published in the papers, and for the time, fixed by his superior officers.

That Carter did have power, duty, and discretion in giving information in regard to such contracts to be let.

The respondent is informed and believes that in very instance during his entire term of being in charge of the Savannah district he gave out to every person properly entitled thereto all information in regard to the various works or the contracts to be let.

VIII. That with regard to his power, duty, and discretion as to receiving proposals and recommending to his superiors the awarding of contracts, that the statement of the bill is true.

That Carter did receive bids for the contracts mentioned in the bill and did recommend to his superior officer the letting of the contracts to certain parties. That in every instance but one, his recommendation was to let the contract to the lowest bidder, and such recommendation was approved by his superior officer. That in the case mentioned the recommendation was not made to the lowest bidder for the reason that such lowest bidder was a failing or defaulting contractor in the performance of contracts with the United States, and under the law of regulations was debarred another contract.

[45] That Carter did have power, duty, and discretion with regard to superintending the work being done by contractors in said district or in approving or rejecting material.

That in the exercise of such power, duty, and discretion with regard to the contracts mentioned in the bill, Carter appointed engineers and inspectors upon the work, some of whom have since testified as witnesses for the Government, whose duty and instructions were to carefully watch and inspect the performance of the work under the contract, and to make in writing to Carter or to the engineer officer at Savannah reports every ten days of the progress of the work and of the amount of work performed, and as to whether it was done in accordance with the specifications. That the aforesaid inspectors and assistant engineers did so make such reports, and that the same were on file in the office of the engineer at Savannah, and that in each instance it stated that the work was done in accordance with the contract; was signed and certified to by the engineer making it as being true and correct upon his honor.

That Carter did have power, duty, discretion in approving
53 the accounts for said work under said several contracts. That as a matter of fact the method of rendering such accounts was that the employees of the engineer officer under said Carter, from the before-mentioned trimonthly reports, made computations and calculations of the quantity of work done and performed by the several contractors and of the amount due them for such work, and notice of such amount then sent to the contractors. That until such report and computation was made and notice given the contractors did not know and had no means of knowing how much work they had done, or what there was due him or them.

That in the case of each and every contract mentioned in said bill, the account for work done was made as hereinbefore stated, and

was correct and true, and based entirely upon the reports of the officers and agents of this complainant; and that [46] the payments made for such work were in accordance with such report, at the rates fixed by the contract, and that the amount paid was only the amount that was due to them for the work actually performed.

IX. The defendant further says, that with regard to the second portion of said bill, under the head "The scheme devised to defraud," that the defendant is informed and believes that no part of said portion is true, and he denies it.

That there was no such conspiracy, as alleged therein, to defraud the complainants, or to get the work done at greater prices than should properly have been paid; or that Carter or the persons therein mentioned in any way during the said times, engaged in any conspiracy of any kind or of the character therein set forth and stated.

X. And the respondent further denies on information and belief, all that portion of the bill under the head "III," being entitled "The scheme to defraud put in operation," and alleges:

That his information is that there was never any scheme to defraud put in operation, or that cheaper or inferior material and work was done, or work not in accordance with the specifications was allowed or paid for. That on the contrary, rigid compliance with the specifications was required by said Carter, and carried out by the various contractors.

XI. The defendant further says that with regard to that portion of the bill, under the number "IV" entitled "Description of the engineering work."

That he has no knowledge or information in regard thereto. He has seen or made an examination of most of the contracts mentioned in the bill, but that no such diagrams or drawings as
54 shown by exhibits "A," "B," "C," and "D" were annexed to said contracts, or made part thereof, but that the same are purely theoretical drawings of what it is contended by ene[47]mies of Carter and persons differing with him as to the engineering features of the work, should have been required under these contracts. That as to the theories set forth in this portion of the bill, or as to any alleged fact therein stated as to the cost of the mattresses therein mentioned, or as to the inferences which are sought to be drawn from the statements therein contained, the respondent has no knowledge; but is informed and believes that the theories are wrong, the facts not correctly stated, and the inferences unwarranted.

XII. This defendant further says with regard to that portion of the bill numbered "V," headed "Details of the fraud introduced into and under the contracts," that he avers, upon information and belief, that each and every statement as to alleged facts, if there be any stated in the said portion of the bill down to and including the first six lines on page 23, is untrue, and that there was no such act done for the purpose therein specified, as therein stated, to

defraud the United States; but that wherever a change was made from one kind of mattress to another it was done within the contract, for the sole purpose of enabling the work to be done properly, to meet the engineering difficulties of the situation as they presented themselves, and was without fraud or intention to defraud the United States.

That it is true, as this respondent is informed and believes, that certain contracts were let to the parties named; and that, as this defendant is informed and believes, the numbers of the contracts in the Savannah district, the date of the contract, and the party who was the contractor is accurately specified and set out in said paragraph at page 23 of the said bill.

This defendant has no knowledge as to whether the allegations of this part of the bill, that these contracts were for the benefit of and operated by the so-called conspirators, as stated therein, but his information is that Carter and Connelly had no interest therein.

[48] The respondent, however, calls attention to the fact that in none of these contracts as therein set out does co-defendant Benjamin D. Greene appear to be the contractor or to be interested therein; nor is such fact stated in this bill except inferentially.

XIII. This defendant further says, upon information and belief, and alleges that every statement in the concluding portion of said part of the bill numbered "V," as the same appears on page
55 24 of the bill, is untrue, and they are denied, and he alleges that the complainants were not defrauded; that cheap and inferior material, not in accordance with the specifications of the contracts, was not put in the work; nor were there any payments made to the contractors for such work at high and exorbitant prices, but that the same was only paid for at the contract price, such price being the price approved by Carter's superior officers before the work was changed, and that the work was in all respects properly done and performed.

XIV. The respondent further says that if it be the claim of this bill to connect the said co-defendant, Benjamin D. Greene, with the Atlantic Contracting Company, who, it is charged and admitted, was the contractor for the two contracts, 6515 and 6517, both dated October 8, 1896; that as this defendant is informed and believes, the fact is with regard to said contracts that said Greene was a stockholder of said Atlantic Contracting Company; that said contracts were properly let and, in so far as permitted by the Government, properly performed; that in the months of July, August, September, and October, the contractor, the Atlantic Contracting Company, was engaged in the performance of said contracts and did a large quantity of work; that the contracts provided that they were not obliged to work in advance of an appropriation, and that sometime in October, 1897, there being no appropriation available for payment of work done under these contracts they suspended work, having earned a large amount of money, which the Government had not paid; that an appropriation became [49] available

for the payment of this work on the first day of July, 1898, and that thereafter the said Atlantic Contracting Company demanded payment from the complainants for the work done, which, under the terms of the contract was then due, and that the said complainants refused to make such payments, thereby committing a breach of the contract between the complainants and the contractor; that prior to that time, and about the month of November, 1896, to the 1st of July, 1897, the said Atlantic Contracting Company had done and performed a very large volume of work under these two contracts, and the Government had retained in its possession (in accordance with the terms of the said contracts), ten per centum (10%) of the amount of work done, and that by reason of the breach of the contract above set forth, on the part of the complainants herein, in refusing to pay the amount that was justly due and owing to the contractor, this reserved percentage became due and payable.

That about a year after the said breach of the contract, as above set forth, the complainants in spite of their breach, as above
56 stated, sought to annul said contract by requiring the said contractor to proceed with the work, and on its failure to do so, they declared the contract annulled. The said declaration was based not upon any fraud in obtaining the contract or in its performance, but solely because the contractor refused to proceed.

This respondent says further, that thereafter and in January, 1900, the Atlantic Contracting Company, with the defendant's firm as attorneys, duly commenced actions in the Court of Claims to recover from the complainants herein the amount earned by the contractors on the two said contracts, and also profits that they would have earned if allowed to complete the contracts in accordance with their terms, which they were prevented from earning by reason of the breach of the contract, as hereinbefore set forth.

[50] That the amount due the said contractor, as appears by the petitions in said Court of Claims, is $359,139.69 for money earned, and $600,000 for profits.

That the said actions in the Court of Claims have been diligently prosecuted, and there has been no default or delay on the part of the claimant therein, and that up to the present time no answer has been filed by the United States, the defendant in said actions, and that under the rules of the Court of Claims the failure to file an answer is equivalent to a general denial on the part of the United States.

That the claimant therein has nearly completed its proof, delayed only by inability so far to obtain certain documents from the complainants.

If the co-defendant, Benjamin D. Greene, is to be charged with the receiving of moneys, as alleged in this bill, he should be given credit for the amount due from the Government in these actions of the Atlantic Contracting Company against the United States, for upon an equitable settlement of the accounts the United States owes the Atlantic Contracting Company, who in this bill is treated as if it were identical with Greene, and therefore owes Greene, instead of

Greene owing the Government the large amount set forth in the bill herein.

XV. This defendant further says that upon information and belief he denies that portion of the bill numbered "VI" and headed "The division of the money," but he is informed and believes that Carter, mentioned therein, never received any division of these moneys, but that Robert F. Westcott, who was the father-in-law of Carter, had certain contractual engagements with the contractors, or some of them, and advanced moneys and was paid the same by them, and had some interest in the said contracts.

57 [51] What interest it is of this complainant what was done by the contractors with their money, so long as the contracts were properly obtained and the work properly done, this defendant is at a loss to understand.

XVI. With reference to the portion of the bill numbered "VII," headed "Greene's investments."

This respondent denies that the amount set forth in the schedule on page 30 states in any way the profits on said contracts received by the said Greene. It will be noticed that nothing is taken into consideration in this part of the bill, nor in any part of it, for that matter, of the amount of money necessary to perform the various contracts, or required to be expended for work, labor, and material in its performance; but this bill treats as profits, and alleges to have been divided, the gross amount received from the Government on these contracts.

This defendant denies that these alleged profits, which were paid the contractors, if they came into the hands of Greene, in any constituted in his hands, or in the hands of anybody with or without notice, a trust fund for the benefit of the complainant.

XVII. The respondent denies specifically that exhibit "F," purporting to be a table "setting forth certain of the proceeds of said fraudulent profits from the share of the same retained by said Benjamin D. Greene, aggregating $113,926.55, have been traced into the possession of" this defendant.

That as to the exhibit "F," mentioned by this part of the bill, the respondent will deal with that later in this answer.

XVIII. This defendant further says as to that part of the bill numbered "VIII," headed "The board of inquiry": He has no knowledge or information as to many of the matters therein stated, but that he denies in every way as fully as possible that he ever received any information, or that he now be[52]lieves that there was any evidence produced before the said board of any kind showing the conspiracy, as alleged therein; that he knows nothing of the reasons that Robert F. Westcott, in that part mentioned, had for not going before said board, but that he was shown the original letter [illegible] Westcott, of which the following is a copy:

"RICHFIELD SPRINGS, *October 18, '97.*

MY DEAR OBERLIN: I have your telegram; also telegram from Colonel Gillespie, asking me, as you have done several times, to come

before the board to testify. You know my disposition towards
58 you but do you see any reason—I do not—why I should submit my private affairs to this board, either by furnishing the accounts to which you refer or by being examined personally? I must decline to do so. The account referred to relates to many matters of a private character with which you have had nothing to do. As to matters with which you have had to do, I have given you powers of attorney, as to my moneys and property, under which you have acted for years because of your close personal relations. For the same reason I have given you money for your own use. I understand that those matters have been proven to the board, but I do not see that they are properly within the inquiry or that I should testify about them. As to coming before the board personally, you know that my health is such as to make this hazardous, a consideration which I should put aside if I thought I ought to be examined. The telegram from Colonel Gillespie is a very courteous one. Please explain to him with like courtesy my position.

Affectionately,

R. F. WESTCOTT.

To Captain CARTER."

and was told by Carter and others that the ill health of Westcott and his disinclination to have the board of inquiry pry into his private business matters was the reason of his not going before the board.

XIX. The respondent further says with reference to that part of the said bill beginning on page 34 and continuing down to page 36, under the headings "The court martial," and "The appeal," that he believes the statements therein: that there was a court martial, and that Carter was convicted by said court martial; and there were habeas corpus proceedings had by Carter; and in both the court martial and the habeas corpus proceedings the respondent's firm acted as counsel, are true.

[53] That with reference to any other statements therein contained which in any way charges defendant with any notice or knowledge of any fraud on the part of the contractors or Carter, this defendant denies that there was such notice or knowledge.

XX. That with reference to the review of the evidence by the Attorney General, as stated on page 36, the complainant has omitted to state what the respondent alleges the fact to be:

That shortly after the decision of the court martial, the evi-
59 dence and decision were referred to Hon. George F. Edmonds, formerly United States Senator from Vermont, by Mr. McKinley, then President of the United States;

That Mr. Edmonds, one of the ablest and most accurate of lawyers, carefully examined the same and made a report to the President of the United States, and that in and by said report he found and stated, as his conclusion, that there was not sufficient evidence before the court-martial to warrant their finding Carter guilty of the charges

of conspiracy to defraud the United States, as alleged in the charges and specifications before said court-martial and referred to in the bill.

XXI. The respondent further says with reference to that part of the bill entitled "The indictment of Greene and the Gaynors et al."

That it is true, as therein stated, that on or about the 8th day of December, 1899, the grand jury for the southern district of Georgia found a bill against the parties therein mentioned and named, charging them with a conspiracy to defraud the United States.

That the trial of said indictments was set for the 17th day of March, 1902, and at that time Edward H. Gaynor and William T. Gaynor appeared in court ready for trial, but that the same was not moved, but that the trial was postponed indefinitely.

That some time in November, 1903, Carter (whose term of imprisonment under said court-martial and decision had ex[54]pired) was released from Fort Leavenworth, Kansas, where he had been confined, and the Government took no steps to bring him to trial upon said indictment pending against him in the State of Georgia.

XXII. He further says with reference to that part of the bill entitled "The hearing for removal," that the facts with regard to the hearing, the officers before whom it took place, and the proceedings in court are stated with substantial correctness, and that respondent's firm did act for Benjamin D. Greene and John F. Gaynor, therein mentioned.

But this defendant denies that in the conduct of said proceedings the said firm admitted that the proof established the fact that the profits of said contract had been divided into thirds; "one-third to Greene, one-third to Gaynor, and that the other third had gone indirectly to Oberlin M. Carter. That it was established on said hearing that Robert F. Westcott had before these contracts were made and while some of them were being performed been engaged and interested in other business with Greene and Gaynor, or one or both of them; that he had used his efforts to obtain contracts for the
60 doing of work on the Delaware, Lackawanna & Western Railroad Company, with which road he was indirectly connected, in which contracts he was to be interested; that he had furnished to Greene and Gaynor money to pay for the carrying on of the contracts with the United States Government, or some of them; that he admitted having received large sums of money from these contractors at various times.

XXIII. The respondent reiterates his denial that in this removal proceedings, or in any proceeding, he got information sufficient to warrant a belief that there had been any conspiracy to defraud the United States between the parties mentioned, or did he ever have any notice of any fraud upon the Government. The evidence on such proceeding, on the contrary, convinced this respondent that there was no conspiracy, and that the Government was not defrauded of a dollar.

[55] XXIV. He specifically denies that part of the bill in which it is stated:

"Your orators aver and charge that in order to prevent your orators from recovering from the said Benjamin D. Greene the large amount of investments into which he had diverted the said money of the United States so fraudulently obtained, the said Benjamin D. Greene set about concealing the same by making other people the holders thereof, but secretly for his benefit."

In so far as it sought in any way to connect this respondent with the statement, it is denied, and he alleges on information and belief, that no such act or acts were done by the said Greene.

XXV. This defendant now desires to take up the Exhibit "F," and to specifically state his connection and relation with the said securities mentioned in said exhibit:

It will be noticed that as to the item Oct. 12, 1898, $5,000; Oct., 1899, $15,783.80; that these sums are alleged to have come into the possession of this defendant long prior to any proceedings, civil or criminal, that were begun against the said Greene, the indictment mentioned having been found in December, 1899.

That immediately upon the receipt of such $5,000 and of the sum of $15,783.80, that he turned the same over to Greene or to such person as he directed, without any knowledge of any fraud or intention to defraud the Government or to deprive it of its property or rights.

61 And the respondent further says that for a long time he was the counsel and personal friend of the aforesaid Benjamin D. Greene; that he had been a man of affairs engaged in the performance of large contracts either as principal, or as financial backer, outside of those mentioned in this bill of complaint, and having no connection with the Government, as for instance contracts for the building of a tunnel under the East River, contracts for the building, in whole or in part, of a railroad in the Adirondack Mountains, State of New York, contracts for building a sewer system in Orange, in the State of New Jersey.

[56] That the respondent knew him to be a man of wealth at the time he first became acquainted with him, which was in or about the year 1892.

That with reference to all the other items mentioned in said Exhibit "F," save and except the Norfolk & Western stock, defendant states and affirms:

That the said Greene for his own convenience carried on a speculative account in the name of defendant, with certain brokers in the city of New York, or elsewhere, and that with the assent of this defendant; and that the securities mentioned therein as having been purchased, were purchased on such speculative account or sold, and that defendant had never had them, nor had any interest in them; does not remember to have had possession of them, and has not them now in his possession, the same having been either bought or sold, as the case may be, without ever having been delivered into the possession of defendant, as he remembers it; but if he did have them, or any of them, he has long before the commencement of this suit turned them over to Greene or his order.

That the small items of dividends collected on account of securities held, were moneys received by defendant and paid out or disbursed long prior to the commencement of this suit, and for said Benjamin D. Greene or on his account.

XXVI. This defendant further says with reference to the said 400 share of the Norfolk & Western stock mentioned in said bill:

That at the time of the arrest of said Benjamin D. Greene in December, 1899, he was held to bail in the sum of $25,000. That a friend and client of defendant, one Leary, became surety on the bond for his appearance before the commissioner in the sum of $25,000, on defendant's giving to said Leary a written guarantee to hold him, Leary, harmless from loss or damage by reason of his becoming surety for said Greene.

[57] That at about that time said Greene deposited with defendant some securities for the purpose of indemnifying defendant
62 against loss by reason of his having indemnified said Leary, with the understanding that at any time he desired he might withdraw the securities so deposited and dispose of them, substituting others in their place. That the securities so deposited were also to be held by the respondent to secure him for the fees and disbursements that might be incurred by him or his firm in defending said Greene, or in caring for his interests in any proceedings brought by the United States against him, or in any other matters, there being several matters of litigation, in which said Greene was interested, pending in the respondent's office.

That from time to time the securities so deposited were withdrawn by Greene and others substituted in their place, and that the Norfolk & Western stock, now in defendant's hands, are securities that the defendant deposited or substituted in place of those originally deposited, and the respondent now avers that he holds said Norfolk & Western stock as a *bona* fide holder, as security for the obligation that he is under to the said Leary by reason of his having become surety on said bond, or by reason of the said Leary having gone upon another bond for the sum of $40,000 for Greene's appearance in the State of Georgia after the conclusion of the said removal proceedings, the agreement to indemnify Leary having been extended to cover said last-mentioned bonds, and also to secure the payment to the respondent, and to his firm, of the various sums of money that he has advanced and for services rendered for said Greene in various matters since that time.

The respondent further says that he is informed and believes and charges the truth to be that the said Greene is amply responsible financially to meet and to pay any judgment that may be obtained against him by the United States in a suit brought to recover moneys wrongfully or fraudulently obtained by him.

[58] He further says that he personally is amply responsible financially to meet and pay any judgment that may be recovered by the United States against him for the value of the said 400 shares of Norfolk & Western stock, if the Government should sue him, and recover such value in an action at law.

XXVII. Moreover, this defendant denies all and singular the allegations and insinuations in the said bill of complaint contained, except alone in so far as the same are herein specifically and expressed admitted.

And having fully answered he prays to be hence dismissed with his reasonable costs by him about his defense expended.

And he will ever pray, &c., &c.

L. LAFLIN KELLOGG.

JOHN H. LEWIS, p. d.

63 STATE OF NEW YORK,
Borough of Manhattan, City and County of New York, ss:

I, Luther Laflin Kellogg, whose name is signed to the annexed bill, which is also in the form of an affidavit for use in the said cause, being first duly sworn, do depose and say: That the matters and things contained in the foregoing answer (and affidavit), so far as made of my own knowledge are true, and so far as made upon knowledge or information derived from others, I believe them to be true.

Given under my hand this 1st day of March, 1904.

LUTHER LAFLIN KELLOGG.

Subscribed and sworn to before me this 1st day of March, 1904.
[SEAL.] THOS. A. HEALY.
Notary Public 192, New York County.

[59] Indorsed: In the Circuit Court of the United States for the Western District of Virginia. United States of America v. Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk & Western Railway Company. Answer. Filed Mch. Rules, 1904, (Mch. 7th). W. M. Mauzy, D. C. Attorneys for ———, 120 Broadway, Borough of Manhattan, New York City.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

[60] At a term of the Circuit Court of the United States for
64 the Western District of Virginia, continued by adjournment from June 1st, 1904, and held at Lynchburg on Thursday, the 2nd day of June, A. D. 1904.

Hon. Henry C. McDowell, judge.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE ET AL.

This cause came on to be further heard and was argued by counsel, upon consideration whereof it is adjudged, ordered, and decreed:

1st. That the demurrer of defendant, L. L. Kellogg, to the bill of complaint be, and the same is hereby, overruled.

2nd. That the motion of said defendant that the injunction heretofore awarded in this cause be vacated, be, and it is hereby, overruled. And it is ordered that said injunction be continued and kept in force until the further order of the court.

3rd. The answer of said defendant having been filed, it is ordered that complainant be allowed until the first Monday in July, 1904, to file exceptions or replications thereto.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

[61] At a term of the Circuit Court of the United States for the Western District of Virginia, continued by adjournment from June 3rd, 1904, and held at Lynchburg, on Wednesday, the 15th day of June, 1904.

Hon. Henry C. McDowell, judge.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE ET AL. } In equity. Bill, &c.

It appearing to the court that at the time of the passage of the order of this court of June 2nd, 1904, the fact that the complainant had already filed replications to the answers of defendants was overlooked.

It is ordered by the court that the said replications shall stand as if filed at the July rules, 1904, so that the time for taking testimony in said cause shall begin to run from said July rules, 1904.

65 In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE ET AL. } April rules, 1904.

[62] The replication of the above-named complainant to the answer of L. Laflin Kellogg, defendant in the above-stated cause.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed,

or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly as in and by its said bill it has already prayed.

MARION ERWIN,
Special Assistant to the Attorney General,
Complainant's Solicitor.

Endorsed: United States vs. Benjamin D. Greene et als. Replication to answer of L. Laflin Kellogg. Filed April 4, 1904, Wm. McCauley, clerk. Ent'd O. B. 3, page 158.

In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, AND the Norfolk and Western Railway Company, defendants.

[63] The petition for leave to intervene, and the bill of intervention therefor, of Mary C. Leary, administratrix of the goods, chattels, and credits of James D. Leary, late of the city, county,
66 and State of New York, deceased, exhibited against The United States of America, Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk and Western Railway Company.

Mary C. Leary, of the city, county, and State of New York, as administratrix of the goods, chattels, and credits of James D. Leary, late of said city, county, and State, deceased, brings this her petition for leave to intervene herein, and presents this as her bill of intervention, leave thereto being first had, and thereupon such petition shows:

To the judges of the Circuit Court of the United States for the Western District of Virginia, sitting in equity:

Mary C. Leary, of the city of New York and a citizen of the State of New York, in her capacity as administratrix of the goods, chattels, and credits of James D. Leary, late of said city and State, deceased, brings this her bill of intervention [64] against all of the parties to this action, and thereupon the intervenor complains and says:

First. That on or about the 8th day of September, 1899, in the District Court of the United States for the Southern District of Georgia a true bill of indictment was returned to said court by a grand jury of the United States, duly empanelled and sworn, against the above-named defendant, Benjamin D. Greene, and certain other defendants, charging them with conspiracy to defraud the United States by and through a certain scheme to defraud, substantially as set forth in the bill of complaint in this action.

Second. That thereafter and on or about the 11th day of December, 1899, the said Benjamin D. Greene was arrested in the city of New York upon a warrant issued by John A. Shields, United States commissioner for the southern district of New York, based on said indictment, and was held in the sum of $25,000 bail to await a warrant of removal from the District Court for the Southern District of New York remanding said Greene to the State of Georgia for trial.

Third. Thereupon the said Greene either personally or through the meditation of the above-named defendant, Luther Laflin Kellogg, who was said defendant's attorney, applied to the intervenor's decedent, James D. Leary, to become the bondsman of said Greene upon said bail bond, and said Leary consented to become such bondsman and did sign and execute a bail bond in the said sum of $25,000, and the said Greene at the same time placed in the hands of his said attorney, Luther Laflin Kellogg, the defendant above named, as
67 trustee and depositary, to secure said Leary against any loss which he might sustain by reason of his becoming such bondsman, three hundred shares of the capital stock of the Delaware, Lackawanna and Western Railroad Company upon the condition and understanding that said Kellogg should hold said shares of stock in [65] trust for said Leary until said Leary was released from said bond, or in case that said Leary's liability thereon should be established, that said shares of capital stock should be applied in payment of the obligation assumed by said Leary. Thereafter said shares of stock were withdrawn by said Greene from the custody of said Kellogg, and said Greene deposited with said Kellogg in lieu thereof four hundred (400) shares of the common stock of the Norfolk and Western Railway Company (being the shares referred to in the bill of complainant), to be held by said Kellogg upon the same terms and conditions as those upon which said Delaware, Lackawanna and Western stock was originally deposited with him. Said shares of Norfolk and Western Railway stock are still held by said Kellogg as such trustee and depositary aforesaid.

Fourth. Thereafter such proceedings were duly had in the said District Court of the United States for the Southern District of New York and in the District Court of the United States for the Southern District of Georgia as that the trial of said indictment was set for the 17th day of March, 1902, in the said District Court of the United States for the said Southern District of Georgia. On or about the 28th day of May, 1901, a warrant was duly issued by the district judge for the southern district of New York directing the removal of the said defendant Greene to the State of Georgia for trial upon the aforementioned indictment, and thereupon said Benjamin D. Greene was admitted to bail in the sum of $40,000 for his appearance in Georgia for trial upon said indictment.

Fifth. That thereupon said Benjamin D. Greene and his said attorney, Luther Laflin Kellogg, applied to the intervenor's intestate, James D. Leary, to become surety upon said bail bond of

$40,000, which the said James D. Leary agreed to do upon the condition and understanding that the securities held in trust or on deposit as heretofore alleged by the defendant, Luther Laflin Kellogg, should remain and continue in the hands of the said Luther Laflin Kellogg as security and indemnity [66] to the said James D. Leary for signing said bail bond of $40,000 for the appearance of said Greene in Georgia for trial upon said indictment.

Sixth. That upon such understanding and agreement the said James D. Leary, the intervenor's decedent, did on or about
68 the 20th day of January, 1902, jointly with the defendant, Benjamin D. Greene, make, execute, and deliver an obligation and recognizance in words and figures following, to wit:

"UNITED STATES OF AMERICA,
Southern District of New York.

"Be it remembered that on this twentieth day of January, in the year of our Lord nineteen hundred and two, before me, John A. Shields, one of the commissioners duly appointed by the District Court of the United States of America for the Southern District of New York, in the second circuit, to take acknowledgments of bail and affidavits and also to take depositions of witnesses in civil causes pending in the courts of the United States, pursuant to the provisions of the acts of Congress in that behalf, personally came Benjamin D. Greene, of Stamford, Connecticut, principal, and James D. Leary, of 43 East 25th Street, New York City, N. Y., surety, and severally acknowledged themselves to owe to the United States of America, that is to say, the said Benjamin D. Greene the sum of forty thousand dollars, and the said James D. Leary the sum of forty thousand dollars, separately to be levied and made of their respective goods and chattels, lands and tenements to the use of the United States if default shall be made in the condition following, to-wit:

"Whereas the said Benjamin D. Greene has been charged on oath before John A. Shields, one of the commissioners duly appointed, as aforesaid, with having on the 1st day of January, 1897, together with John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connolly, and Oberlin M. Carter, unlawfully, knowingly, and feloniously, amongst themselves and divers other persons unknown, conspired, confederated, and agreed to defraud the United States of America of divers large sums of money by means of a certain fraudulent scheme devised by the said parties, and with having conspired to present false accounts to an officer of the United States, as will more fully appear by the complaint made before the said John A. Shields, commissioner, the complaint of Clarence S. Houghton, assistant United States attorney for the southern district of New York, to which complaint reference is hereby made; and that the said offense was committed within the eastern division of the southern district of Georgia; and that the said Benjamin D. Greene and others had been indicted by grand jury of said district for

said offense; and that the said Benjamin D. Greene was then at the time of making the said complaint within the said southern district of New York; and upon such charge being made, as afore-
69 said, the said John A. Shields did issue his warrant in due form of law for the arrest of said Benjamin D. Greene; and whereas the said Benjamin D. Greene has been brought before the said John A. Shields, one of the commissioners aforesaid, to answer to the said charge, and witnesses having been duly examined in relation of said charge in presence of said Benjamin D. Greene and upon such examination it appearing to the said commissioner that the offence with which the said Benjamin D. Greene stood charged had [67] been committed, and that there was probable cause to believe the said Benjamin D. Greene to be guilty thereof, and the said commissioner having held the said Benjamin D. Greene to await a warrant of removal by the United States district judge, and the said United States district judge having heard application for said warrant of removal and having on the 28th day of May, 1901, issued such warrant to the United States marshal for the southern district of New York for the removal of said Benjamin D. Greene to the southern district of Georgia for trial in the District Court of the United States for the Eastern Division of the Southern District of Georgia, and the said marshal having taken the said Benjamin D. Greene into his custody under said warrant, and the said Benjamin D. Greene having, on May 28th, 1901, presented to the Circuit Court of the United States for the Southern District of New York his petition for writ of habeas corpus, which application was by said circuit court denied, and the said Benjamin D. Greene having prosecuted an appeal to the Supreme Court of the United States from said order denying the said application for said writ of habeas corpus, and the said circuit court having allowed said Benjamin D. Greene to be enlarged on bail pending said appeal, and the said Supreme Court having, on the 6th day of January, 1902, affirmed said order of said circuit court denying said application for habeas corpus and the mandate of said Supreme Court having been filed in said circuit court and the judgment of said Supreme Court having on the 17th day of January, 1902, been made the judgment of said circuit court, and the said Benjamin D. Greene having by an order of said circuit court surrendered himself to said marshal under said warrant for removal to Georgia for trial, and the said Benjamin D. Greene now tendering bail for his appearance in Georgia for trial as aforesaid:

"Now, therefore, the condition of this recognizance is such, that if the said Benjamin D. Greene shall personally appear at the term of the District Court of the United States for the Eastern Division of the Southern District of Georgia, to be holden on the second Tuesday in February, 1902, and from day to day and from term to term, should the case be continued, and then and there to
70 answer to such matters and things as have or shall be objected against him, and to stand to, abide, and perform the orders

of the court, and not depart the said court without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

B. D. GREENE. [SEAL.]
JAMES D. LEARY. [SEAL.]

[68] Acknowledged before me the day and year first above written.

[SEAL OF COMMISSIONER.] JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

James D. Leary, being duly sworn, deposes and says that he is worth the sum of eighty thousand dollars, over and above all his just debts and liabilities.

JAMES D. LEARY.

Sworn to before me this 20 day of January, 1902.

[SEAL OF COMMISSIONER.] JOHN S. SHIELDS,
U. S. Commissioner for the Southern District of New York.

Approved:

E. HENRY LACOMBE,
U. S. Circuit Judge."

which said recognizance after such execution and delivery was duly approved by Hon. E. Henry Lacombe, one of the judges of the Circuit Court of the United States for the Southern District of New York.

Seventh. The trial of the said Benjamin D. Greene upon said indictment was reached in the District Court of the United States for the Southern District of Georgia at the February term, 1902, and no leave to depart the court was given to said Greene.

Eighth. That on the 6th day of March, 1902, in the United States court room in the city of Savannah, Georgia, the said Benjamin D. Greene was duly called to abide the order of said court on said
71 indictment, but failed to appear, and it was thereupon ordered by the court that said defendant Greene be given until 10 o'clock a. m. of March 7, 1902, to appear and abide the order of the court and that he do appear at that time to come into the said court room and abide the order of the court in the premises.

Ninth. That thereafter, to-wit, at the said February term, 1902, of said district court and on the 7th day of March, 1902, at ten o'clock a. m., in the United States court room in the city of Savannah the said Benjamin D. Greene was duly called to come into court to answer the charges pending against him on said indictment and stand and abide by the orders of the court in the premises, but the said Benjamin D. Greene made default and thereupon a judgment was entered by the court on said obligation and recognizance forfeiting the same [69] and adjudging that the United States of America recover against said Greene and said Leary, jointly and severally, the sum of $40,000, unless at the next term of court they should show cause why such order should not be final.

Tenth. That the said Benjamin D. Greene did not at any time thereafter appear in said District Court of the United States for the Southern District of Georgia and show cause why the said judgment and an award of execution which had been made thereon should not be final; so that on the 12th day of January, 1903, the said court duly rendered final award of execution upon said judgment.

Eleventh. That on or about the 11th day of April, 1902, said James D. Leary departed this life intestate, and afterwards, to-wit, on the 21st day of April, 1902, the intervenor, his widow, was duly appointed administratrix of his goods, chattels, and credits by the surrogate of the county of New York, State of New York, and letters of administration having been granted to her, she duly qualified as such administratrix, and is now serving and acting as such.

Twelfth. That on or about the 10th day of September, 1903, the United States of America brought suit against the intervenor in the Circuit Court of the United States for the Southern District of New York upon said recognizance of $40,000 above referred to, to recover the amount thereof; that such proceedings were duly had in said court as that a judgment was entered in said court on or about the 6th day of January, 1908, in favor of the United States of America and against the intervenor upon said recognizance for the sum of $35,377.46, which said judgment has not been paid, set
72 aside or reversed, and which said judgment the intervenor is therefore liable to be compelled to pay upon execution issued thereon.

Thirteenth. That the said four hundred (400) shares of Norfolk and Western stock together with the accumulated di[70]vidends thereon are not of sufficient value to pay the said judgment against the intervenor, the same not being of greater value than thirty-four thousand dollars ($34,000).

Fourteenth. Notwithstanding that the plaintiff in this suit has obtained an order restraining the defendant Luther Laflin Kellogg from devoting the said shares of Norfolk and Western Railway stock to the uses for which they were deposited with him and from delivering them to the intervenor so that she might use them or their proceeds in liquidating the judgment obtained against her in the southern district of New York upon said recognizance of $40,000, the plaintiff is pressing the collection of said judgment against the intervenor, and is taking steps in the Surrogate's Court of New York County to obtain an order directing execution to issue against the intervenor.

Fifteenth. By reason of the premises the intervenor alleges that the defendant Luther Laflin Kellogg holds the securities mentioned in the bill of complaint herein and the dividends thereon, as trustee or depositary for and for the benefit and protection of the intervenor, and that intervenor's claim upon and right to said securities is not liable to the claim of the plaintiff herein except to the extent of any surplus remaining after making full indemnity to the intervenor.

Wherefore the intervenor now prays that each and all of the original parties to this suit may be ordered to enter an appearance to this intervening bill and to show cause why the intervenor's claim should not be held to be valid and just and be allowed by the court, and that in the said order to show cause the plaintiff and the defendants may each be cited to appear herein and answer this intervening bill, though not under oath, oath or affirmation thereto by any of the said parties being here[71]by expressly waived, and the intervenor prays that upon the hearing of the intervenor's bill a decree may be entered decreeing to the intervenor such relief as upon this bill and the answers thereto and on file herein it may be meet and equitable that she should have.

MARY C. LEARY, *Intervenor.*

J. D. HORSLEY,
Solicitor for Intervenor.

73 UNITED STATES OF AMERICA,
Southern District of New York.

Mary C. Leary, being first duly sworn, says that she is the intervenor herein; that she is the administratrix of the goods, chattels, and credits of James D. Leary, late of the county and State of New York, deceased; that she has heard the foregoing petition read and knows the contents thereof and that the statements therein contained are true as she believes.

MARY C. LEARY.

Sworn to before me and subscribed in my presence by the above named Mary C. Leary this eighth day of April, 1908.

[SEAL.]

CHARLES PLATNER,
Notary Public 509, New York County.

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify that Charles Platner, before whom the annexed deposition was taken, was at the time of taking same a notary public of New York, dwelling in said county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 11 day of Apr., 1908.

[SEAL.]

PETER J. DOOLING, *Clerk.*

74 [72] Indorsed: In the Circuit Court of the United States for the Western District of Virginia. The United States of

America, plaintiff, against Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk and Western Railway Company, defendants.

(Original.) Petition for leave to intervene and bill of intervention. David McClure, J. D. Horsley, attorneys for petitioner, 22 William Street, New York. Filed April 18th, '08. W. M. Mauzy, D. C.

In the Circuit Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk and Western Railway Company, defendants.	In equity.

Now, on this day, there is exhibited to the court the [73] proposed bill of intervention of Mary C. Leary, administratrix of the goods, chattels, and credits of James D. Leary, late of the city, county, and State of New York, deceased, against the complainant in this suit, the United States of America and Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk & Western Railway Company, the defendants in this suit, with the petition of said Mary C. Leary, administratrix as aforesaid, praying for leave to intervene under the said bill, and file the said bill of intervention as such and for an order to show cause against said petition being filed and the prayer thereof being granted, and that the aforesaid plaintiff and the aforesaid defendants may each be cited and required to appear and answer said intervening bill;

And, thereupon, it is ordered that the United States of America, the plaintiff in this suit, and Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk and Western Railway Company, the defendants in this suit, being each served ten days prior to May 30, 1908, with a copy of this order, and of said petition for leave to intervene and file the said bill of intervention, and of the said bill
75 of intervention, do show cause on the said thirtieth day of May, 1908, at the United States court in Lynchburg, Virginia, against the granting of leave to file said petition and the granting of the prayer of said petition.

It is further ordered that the service of a copy of this order, together with a copy of said petition and of said intervening bill upon Thomas Lee Moore, one of the solicitors of record for the United States of America, the complainant in this suit, shall be sufficient service upon the United States of America to entitle the court to proceed herein and to adjudicate upon the filing of said petition and the prayers thereof.

[74] And it appearing satisfactorily to the court that the said Luther Laflin Kellogg and the said Benjamin D. Greene are not residents within and cannot be found in the western district of

Virginia, it is ordered that a copy of this order, together with a copy of said petition, and of the said intervening bill be served upon the said Luther Laflin Kellogg or Abram J. Rose, one of his solicitors of record, and also upon Benjamin D. Greene, if practicable, wherever they may be found; and such service of copies shall be sufficient service to entitled the court to proceed herein and to adjudicate upon the filing of said petition and the prayers thereof.

HENRY C. MCDOWELL, *Judge.*

APRIL 17, 1908.

Endorsed: U. S. vs. Benj. D. Greene et als. Decree on Ptn. of Intervention. Filed April 18, '08. Entd. O. B. p. 337.

In the Circuit Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA *vs.* BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk and Western Railway Co.	In equity. Bill, etc.

Petition of Mary C. Leary, administratrix, for leave to [75] file intervention and rule nisi thereon. Demurrer and motion of United States to strike petition and intervention.

And now comes the United States, by Marion Erwin, special assistant to the Attorney General; and Thomas L. Moore, U. S. attorney; and for response to said rules nisi, and showing cause why the said court should not allow said intervention of Mary C. Leary, administratrix, to be filed, say:

76 (1) That it appears from the record and proceedings of said cause in which the said Mary C. Leary, administratrix of James D. Leary, deceased, seeks to intervene, that the said 400 shares of Norfolk & Western Railway Company stock, which is sought by said intervention to subject to the claims of said Mary C. Leary, administratrix, constitute in equity and good conscience a trust fund belonging to the United States and which at the time of the accruing of the alleged claim thereto of the said James D. Leary and of Mary C. Leary, administratrix, and ever since has constituted a trust fund belonging to the United States, and that as against the said Benjamin D. Greene and every one holding under him not a bona fide purchaser for value without notice, the right to intervene in said suit and to set up adverse claims to the United States in, of, or to said stock has been cut off by the decree pro confesso taken in said cause against said Benjamin D. Greene.

(2)[76] That it is nowhere in said petition of Mary C. Leary, or in her said proposed intervention, set up that she is a bona fide purchaser for value in, or, or to, or in respect to said stocks, as against

the rights of the United States therein as set up in the bill of complaint in said cause.

(3) That it appears from the said petition that the only claim or right which the said Mary C. Leary, administratrix, proposes to set up in her said intervention is an oral promise or understanding between the said James D. Leary and Benjamin D. Greene, made through the latter's attorney, L. L. Kellogg, that said 400 shares of stock should be held by said L. L. Kellogg to indemnify said James D. Leary in case said James D. Leary should be compelled to pay an obligation of $40,000 on a recognizance entered into by him as a surety for the appearance of said Benjamin D. Greene to answer to an indictment in a criminal case, which recognizance was forfeited and judgment entered thereon against the administratrix of said James D. Leary, and it therefore appears that the said alleged implied contract under which it is claimed by said administratrix that she has an interest in said stock, is: (a) Not in writing and therefore it cannot be enforced under the statutes of frauds. (b) Whether in writing or not the said alleged implied contract is against public policy and void and cannot be enforced as
77 against the United States in this proceeding, and said Mary C. Leary has no standing in a court of justice to enforce said alleged contract.

(4) That the said intervention is in matter of form and substance without equity.

(5) That the said Mary C. Leary, administratrix, is in laches in not having presented said petition at an earlier stage of the [77] proceedings, and it is now too late.

(6) Wherefore this respondent prays judgment that the said petition for leave to intervene be denied and that said intervention be dismissed and stricken.

MARION ERWIN,
Special Asst. to the Atty. Genl.,
THOS. L. MOORE,
U. S. Atty. for W. Dist. Va.,
Compls. Solrs.

Marion Erwin, being duly sworn, deposes and says that the matters stated in the foregoing response and demurrer are in his opinion well founded in law, and that the same is not interposed for delay.

MARION ERWIN.

Subscribed and sworn to before me this 30th day of May, 1908.

W. M. MAUZY, *D. Clk.*

Indorsed: In the Circuit Court of the United States for the Western District of Virginia. United States of America vs. Benj. D. Greene, L. L. Kellogg, & Norfolk & Western Ry. Co., in equity bill, &c.

Response of United States to petition of Mary C. Leary, admx., for leave to file intervention.

Filed May 30, '08. McD.

78 [78] In the United States Circuit Court for the Western District of Virginia, continued and held at Lynchburg, in and for said district, on July 20, 1908.

UNITED STATES OF AMERICA
v.
BENJAMIN D. GREENE ET AL. } In equity.

This cause having come on to be heard on the petition of Mary C. Leary, adm'x, for leave to file her bill of intervention exhibited therewith in this cause, and on the objection of the complainant herein to granting such leave, was argued by counsel. Upon consideration whereof, for reasons set out in an opinion now filed, it is adjudged, ordered, and decreed that said petition be overruled and that leave to file said bill of intervention be, and is hereby, denied.

Indorsed: United States v. Benj. D. Greene et al. Order. July 20, 1908. Enter: Henry C. McDowell, district judge.

Entered & filed July 20, 1908. S. W. Martin, clerk. Ch. O. B. #3, p. 355.

UNITED STATES
v.
BENJAMIN D. GREENE ET AL. } In equity.

Opinion.

[79] The petition of the administratrix of Jas. D. Leary for leave to file a bill of intervention herein is objected to by the Government.

The bill of intervention does not deny the allegations in the original bill to the effect that the Norfolk & Western stock was purchased with funds embezzled from the Government, nor does it allege that Leary, at the time of the alleged agreement of indemnity, was innocent of knowledge of the facts which are alleged in the original bill and which impress upon the stock a trust in favor of the Government. In this failure of allegation the bill of intervention seems to me to be fatally defective. However, as the pleading may be amended in this respect it will be necessary to go further.

I find myself unable to determin from the bill whether the draftsman is setting up an express agreement that the securities were to be used to indemnify Leary, or a tacit and therefore merely a
79 supposed implied agreement. As uncertainties in pleadings are to be construed against the pleader, we must for the present regard the pleading as alleging a tacit, unexpressed intention, which, but for a rule to be mentioned later, would, from the acts done and the circumstances, create the implied agreement relied

upon. I think it is settled, and counsel seems to concede it, that the law will not imply an obligation on the part of the principal in a bail bond in a criminal case to indemnify his surety. Sec. 3 Am. & Eng. Ency. (Ed Ed.), 684; Highmore on Bail, p. 204; U. S. v. Simmons, 47 Fed., 575; U. S. vs. Ryder, 110 U. S., 729. And to the [80] extent stated I regard the last case cited as a binding decision.

But here again the bill of intervention may be amended. Although verified, the ambiguity of the pleading may be but the imperfect execution of his task by the draftsman. Assuming then that the bill of intervention may be so amended as to unequivocally allege an express agreement between Greene and Leary that the securities deposited with Kellogg were to be used to indemnify Leary, let us consider if there would be shown a right on the part of the proposed intervener to any relief.

The reason why there is no implied obligation on the part of a principal in a bail bond in a criminal case to indemnify his surety is that such a contract is against public policy in that it "gives the public the security of one person only instead of two." As applied to an express contract by the principal to indemnify his security (and as disinguished from a contract by a third person to indemnify the security) it seems to me that the reason for the rule operates quite as strongly to invalidate such express contract as it does to deny the existence of an implied contract. An express contract by the principal in a bail bond in a criminal case to indemnify his surety at least as certainly gives the public the security of only one person instead of two as would an implied contract to such effect.

Where the contract of indemnity is made by some third person, and not by the principal, the public still has the security of two persons. While in the case of U. S. *v.* Ryder, supra, the fact that the indemnitor was not the principal in the bail bond in the case of Chipps *v.* Hartnoll (4 B. & S. 414), was not adverted to, this distinction is of importance. See 16 Am. & Eng. Ency. (2d ed.), 172, where the result of numerous decisions is thus stated:

"In reference to a contract to indemnify a person on account of his becoming bail for a prisoner charged with a cri[81]minal offense, the best rule would seem to be that such a contract is
80 illegal as against public policy where it is entered into by the prisoner himself, but valid and enforceable if persons other than the prisoner are the indemnitors."

In 3 Am. & Eng. Ency. (2d ed.), 684, it is said:

"For obvious reasons of public policy the law will not imply an obligation, nor will it enforce an express agreement, on the part of the principal, to indemnify his bail against the amount of penalty incurred by his default."

Such seems to me to be the necessary conclusion.

In the contention of counsel for the proposing intervenor, to the effect that the Government cannot rely upon the illegality of the agreement between Greene and Leary, I am unable to see merit. No court will lend its aid to enforce an illegal contract, and here

it is the beneficiary under such a contract that moves the court to act. The case of U. S. *v.* Ryder, supra, is here again incidentally in point. In that case, on the objection of Ryder, representing creditors of the defaulting principal in the bail bond, the court refused to subrogate the sureties in the bail bond of to afford them any relief.

As the contract between Greene and Leary, however pleaded, cannot be other than illegal and unenforceable, my conclusion is that leave to file the petition of intervention should be denied.

HENRY C. MCDOWELL,
District Judge.

JULY 20, 1908.

Indorsed: U. S. vs. Benj. D. Greene et al. Opinion. Filed July 20, 1908.

S. W. MARTIN, *Clerk.*

81 In the District Court of the United States for the Western District of Virginia. At Lynchburg, on May 20, 1913.

In equity. Bill, &c. Filed in U. S. circuit court Dec. 19, 1903.

UNITED STATES OF AMERICA, COMPLAINANTS,
v.
BENJAMIN D. GREENE, ET AL. DEFENDANTS.

Petition of Mary C. Leary, administratrix of James D. Leary, deceased, for leave to file bill of intervention, filed April 18, 1908.

Order denying to petitioner leave to intervene entered July 20, 1908.

Appeal from said order to the Circuit Court of Appeals for the 4th Circuit, and from that court to the Supreme Court of the United States.

Order on mandate of the Supreme Court.

The mandate of the Supreme Court of the United States issued on the 22 day of August, 1912, on the appeal of Mary C. Leary, administratrix of James D. Leary, deceased, from the order of the Circuit Court of the United States for the Western District of Virginia of July 20, 1908, which order denied her petition for leave to file in the above stated cause the bill of intervention attached to her petition, being now presented to this court with a copy of the opinion of the Supreme Court, rendered on said appeal:

82 It is now on motion of A. E. Strode and J. T. Coleman, solicitors of said Mary C. Leary, administratrix as aforesaid, ordered by the court that said mandate and opinion be filed in the record of the above stated cause in this court, and that the judgment of the Supreme Court as expressed in said mandate and opinion be, and the same is, made the judgment of this court; and

in accordance therewith the order of said Circuit Court for the Western District of Virginia of July 20, 1908, which denied leave to intervene as aforesaid, is hereby reversed, and leave is hereby granted to said Mary C. Leary, administratrix of James D. Leary, deceased, to file herein said bill of intervention, subject to the condition that the evidence already in shall be taken to be evidence against said intervenor subject to her right to recall and cross-examine such witnesses for the Government as she may be advised; and the said bill of intervention is accordingly now filed.

Endorsed: United States of America vs. Benj. D. Greene, &c. Order No. 1. Enter, Henry C. McDowell. Entered May 20th, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

In the District Court of the United States for the Western District of Virginia. At Lynchburg, on May 20, 1913.

In equity. Bill, &c. Filed in U. S. Circuit Court Dec. 19, 1903.

UNITED STATES OF AMERICA, COMPLAINANTS,
v.
BENJAMIN D. GREENE ET AL., DEFENDANTS.

Order on motion to amend bill of intervention of Mary C. Leary, administratrix.

The solicitors of record of Mary C. Leary, administratrix of James D. Leary, deceased, now presenting to the court her amended bill of intervention, and moving the court that the amendments therein be allowed so that the said bill of intervention shall read as set forth in said amended bill of intervention now presented to the court, it is ordered that the said amendments be allowed without prejudice to the right of the United States of America or of the defendants to the original bill, if any they have, to move to strike from said amended bill the averments added to the original bill of inter-
83 vention or to interpose any defence to the said amended bill of intervention, or any part thereof, which they may deem appropriate.

And it is further ordered that a copy of the said bill of intervention, together with a copy of this order, be served on the United States (or their solicitor of record) and Luther Laflin Kellogg (or his solicitor of record) with all practicable dispatch.

The time for filing answers by any of the parties who may desire to file an answer shall be on or before the expiration of twenty (20) days from the date of such service, excluding the day thereof, unless the time shall be extended by stipulation of the parties or order of this court.

The intervenor is given two (2) months from and after the time for the filing of said answers within which to take such testimony as she may desire to take, and the parties answering said intervention

are given thirty (30) days thereafter within which to take testimony in rebuttal, but the said time for taking testimony may be enlarged by stipulation of the parties or on order of this court.

Testimony may be taken before any examiner of this court under the equity rules, or any notary public under the provisions of the statute, or under such stipulations as the counsel of record for the respective parties may make.

Endorsed: United States of America vs. Benj. D. Greene. &c. Order No. 2. Enter, Henry C. McDowell. Entered May 20th, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

In the district court of the United States for the western district of Virginia.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk and Western Railway Company, defendants.

The petition for leave to intervene and the bill of intervention therefor of Mary C. Leary, administratrix of the goods, chattels, and credits of James D. Leary, late of the city, county, and State of New York, deceased, exhibited against the United States of America, Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk and Western Railway Company.

84 Mary C. Leary, of the city, county, and State of New York, as administratrix of the goods, chattels, and credits of James D. Leary, late of said city, county, and State, deceased, brings this her petition for leave to intervene herein, and presents this as her bill of intervention, leave thereto being had, and thereupon such petition shows:

To the honorable district court of the United States for the western district of Virginia, sitting in equity:

Mary C. Leary, of the city of New York, and a citizen of the State of New York, in her capacity as administratrix of the goods, chattels, and credits of James D. Leary, late of said city and State, deceased, brings this her bill of intervention against all of the parties to this action, and thereupon the intervenor complains and says:

First. That on or about the 8th day of September, 1899, in the district court of the United States for the southern district of Georgia, a true bill of indictment was returned to said court by a grand jury of the United States, duly empanelled and sworn, against the above named defendant Benjamin D. Greene and certain other defendants, charging them with conspiracy to defraud the United States by and through a certain scheme to defraud, substantially as set forth in the bill of complaint in this action.

Second. That thereafter and on or about the 11th day of December, 1899, the said Benjamin D. Greene was arrested in the city of New York upon a warrant issued by John A. Shields, United States commissioner for the southern district of New York, based in said indictment, and was held in the sum of $25,000 bail to await a warrant of removal from the district court for the southern district of New York remanding said Greene to the State of Georgia for trial.

Third. Thereupon the said Greene, either personally or through the mediation of the above named defendant, Luther Laflin Kellogg, who was said defendant's attorney, applied to the intervenor's decedent, James D. Leary, to become the bondsman of said Greene upon said bail bond, and said Leary consented to become such bondsman, and did sign and execute a bail bond in the said sum of $25,000, and the said Greene at the same time placed in the hands of his said attorney, Luther Laflin Kellogg, the defendant above named, as trustee and depositary, to secure said Leary against any loss which he might sustain by reason of his becoming such bondsman, three hundred shares of the capital stock of the Delaware, Lackawanna and Western Railway Company, upon the condition and understanding that said Kellogg should hold said shares of
85 stock in trust for said Leary until said Leary was released from said bond, or in case that said Leary's liability thereon should be established that said shares of capital stock should be applied in payment of the obligation assumed by said Leary. Thereafter said shares of stock were withdrawn by said Greene from the custody of said Kellogg, and said Greene deposited with said Kellogg in lieu thereof four hundred (400) shares of the common stock of the Norfolk and Western Railway Company (being the shares referred to in the bill of complaint) to be held by said Kellogg upon the same terms and conditions as those upon which said Delaware, Lackawanna and Western stock was originally deposited with him. Said shares of Norfolk & Western Railway stock are still held by said Kellogg as such trustee and depositary aforesaid.

Fourth. While intervenor believes that the agreement between her decedent and the defendants, Greene and Kellogg, was substantially as is set out in the third paragraph above of this intervention, she is yet advised that in his sworn answer filed in this cause by the defendant, Luther Laflin Kellogg, at the March rules, 1904, the said defendant, Kellogg, set out the agreement made in reference to the said stock as follows, in paragraph XXVI of the said answer:

XXVI. This defendant further says with reference to the said 400 shares of the Norfolk and Western stock mentioned in said bill:

That at the time of the arrest of said Benjamin D. Greene in December, 1899, he was held to bail in the sum of $25,000; that a friend and client of defendant, one Leary, became surety on the bond for his appearance before the commissioner in the sum of $25,000, on defendant's giving to said Leary a written guarantee to

hold him, Leary, harmless from loss or damage by reason of his becoming surety for said Greene;

That at about that time said Greene deposited with defendant some securities for the purpose of indemnifying defendant against loss by reason of his having indemnified said Leary, with the understanding that at any time he desired he might withdraw the securities so deposited and dispose of them, substituting others in their place; that the securities so deposited were also to be held by the respondent to secure him for the fees and disbursements that might be incurred by him, or his firm, in defending said Greene or in caring for his interests in any proceedings brought by the United States against him, or in any other matters, there being several matters of litigation in which said Greene was interested pending in the respondent's office;

86 That from time to time the securities so deposited were withdrawn by Greene and others substituted in their place, and that the Norfolk and Western stock, now in defendant's hands, are securities that the defendant deposited or substituted in place of those originally deposited, and the respondent now avers that he holds said Norfolk & Western stock as a bona fide holder, as security for the obligation that he is under to the said Leary by reason of his having become surety on said bond or by reason of the said Leary having gone upon another bond for the sum of $40,000 for Greene's appearance in the State of Georgia after the conclusion of said removal proceedings, the agreement to indemnify Leary having been extended to cover said last-mentioned bonds and also to secure the payment to the respondent and to his firm of the various sums of money that he has advanced and for services rendered for said Greene in various matters since that time.

The respondent further says that he is informed and believes and charges the truth to be that the said Greene is amply responsible financially to meet and pay any judgment that may be obtained against him by the United States in a suit brought to recover moneys wrongfully or fraudulently obtained by him.

He further says that he personally is amply responsible financially to meet and pay any judgment that may be recovered by the United States against him for the value of the said 400 shares of Norfolk & Western stock, if the Government should sue him and recover such value in an action at law.

Fifth. Thereafter such proceedings were duly had in the said District Court of the United States for the Southern District of New York and in the District Court of the United States for the Southern District of Georgia as that the trial of said indictment was set for the 17th of March, 1902, in the said District Court of the United States for the said Southern District of Georgia. On or about the 28th day of May, 1901, a warrant was duly issued by the district judge for the southern district of New York directing the removal of the said defendant, Greene, to the State of Georgia

for trial upon the aforementioned indictment, and thereupon said Benjamin D. Greene was admitted to bail in the sum of $40,000 for his appearance in Georgia for trial upon said indictment.

Sixth. That thereupon said Benjamin D. Greene and his said attorney, Luther Laflin Kellogg, applied to the intervenor's intestate, James D. Leary, to become surety upon the said bail of $40,000, which the said James D. Leary agreed to do upon the condition and understanding that the securities held in trust or on deposit as heretofore alleged by the defendant, Luther Laflin Kellogg,
87 should remain and continue in the hands of the said Luther Laflin Kellogg as security and indemnity to the said James D. Leary for signing said bail bond of $40,000 for the appearance of said Greene in Georgia for trial upon said indictment.

Seventh. That upon such understanding and agreement the said James D. Leary, the intervenor's decedent, did on or about the 20th day of January, 1902, jointly with the defendant, Benjamin D. Greene, make, execute, and deliver an obligation and recognizance in words and figures following, to-wit:

"UNITED STATES OF AMERICA,

"*Southern District of New York:*

"Be it remembered that on this twentieth day of January, in the year of our Lord, nineteen hundred and two, before me, John A. Shields, one of the commissioners duly appointed by the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to take acknowledgments of bail and affidavits and also to take depositions of witnesses in civil causes pending in the courts of the United States, pursuant to the provisions of the acts of Congress in that behalf, personally came Benjamin D. Greene, of Stamford, Connecticut, principal, and James D. Leary, of 43 East 25th Street, New York City, N. Y., surety, and severally acknowledged themselves to owe to the United States of America, that is to say, the said Benjamin D. Greene the sum of forty thousand dollars, and the said James D. Leary the sum of forty thousand dollars, separately to be levied and made of their respective goods and chattels, lands and tenements, to the use of the United States if default shall be made in the condition following, to-wit:

"Whereas the said Benjamin D. Greene has been charged on oath before John A. Shields, one of the commissioners duly appointed, as aforesaid, with having on the 1st day of January, 1897, together with John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connolly, and Oberlin M. Carter, unlawfully, knowingly, and feloniously amongst themselves and divers other persons unknown, conspired, confederated, and agreed to defraud the United States of America of divers large sums of money by means of a certain fraudulent scheme devised by the said parties, and with having conspired to present false accounts to an officer of the United States, as will more fully appear by the complaint made before the said John A.

Shields, commissioner, the complainant of Clarence S. Houghton, assistant United States attorney for the southern district of New York, to which complaint reference is hereby made, and that
88 the said offense was committed within the eastern division of the southern district of Georgia, and that the said Benjamin D. Greene and others had been indicted by grand jury of said district for said offense, and that the said Benjamin D. Greene was then at the time of making the said complaint within the said southern district of New York; and upon such charge being made, as aforesaid, the said John A. Shields did issue his warrant in due form of law for the arrest of said Benjamin D. Greene; and whereas the said Benjamin D. Greene has been brought before the said John A. Shields, one of the commissioners aforesaid, to answer to the said charge, and witnesses having been duly examined in relation of said charge in presence of said Benjamin D. Greene, and upon such examination it appearing to the said commissioner that the offense with which the said Benjamin D. Green stood charged had been committed, and that there was probable cause to believe the said Benjamin D. Greene to be guilty thereof, and the said commissioner having held the said Benjamin D. Greene to await a warrant of removal by the United States district judge, and the said United States district judge having heard application for said warrant of removal, and having on the 28th day of May, 1901, issued such warrant to the United States marshal for the southern district of New York for the removal of said Benjamin D. Greene to the southern district of Georgia for trial in the District Court of the United States for the eastern division of the southern district of Georgia, and the said marshal having taken the said Benjamin D. Greene into his custody under said warrant, and the said Benjamin D. Greene having on May 28th, 1901, presented to the Circuit Court of the United States for the Southern District of New York his petition for writ of habeas corpus, which application was by said Circuit Court denied; and the said Benjamin D. Greene having prosecuted an appeal to the Supreme Court of the United States for said order denying the said application for said writ of habeas corpus, and the said Circuit Court having allowed said Benjamin D. Greene to be enlarged on bail pending said appeal; and the said Supreme Court having on the 6th day of January, 1902, affirmed said order of said Circuit Court denying said application for habeas corpus, and the mandate of said Supreme Court having been filed in said Circuit Court, and the judgment of said Supreme Court having on the 17th day of January, 1902, been made the judgment of said Circuit Court, and the said Benjamin D. Greene having by an order of said Circuit Court surrendered himself to said marshal under said warrant, for removal to Georgia for trial, and the said Benjamin D. Greene now tendering bail for his appearance in Georgia for trial as aforesaid:

89 "Now, therefore, the condition of this recognizance is such that if the said Benjamin D. Greene shall personally appear at the term of the District Court of the United States for the East-

ern Division of the Southern District of Georgia, to be holden on the second Tuesday in February, 1902, and from day to day and from term to term should the case be continued, and then and there to answer to such matters and things as have or shall be objected against him, and to stand to, abide, and perform the orders of the court, and not depart the said court without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

"B. D. GREENE. [SEAL.]
"JAMES D. LEARY. [SEAL.]

"Acknowledged before me the day and year first above written.
[SEAL OF COMMISSIONER.] JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

"SOUTHERN DISTRICT OF NEW YORK, *ss:*

"James D. Leary, being duly sworn, deposes and says that he is worth the sum of eighty thousand dollars over and above all his just debts and liabilities.

"JAMES D. LEARY.

"Sworn to before me this 20th day of January, 1902.
"[SEAL OF COMMISSIONER.] JOHN S. SHIELDS,
"*U. S. Commissioner for the Southern District of New York.*

"Approved:

"E. HENRY LACOMBE,
"*U. S. Circuit Judge.*"

which said recognizance after such execution and delivery was duly approved by Hon. E. Henry Lacombe, one of the judges of the Circuit Court of the United States for the Southern District of New York.

Eighth. The trial of the said Benjamin D. Greene upon said indictment was reached in the District Court of the United States for the Southern District of Georgia at the February
90 term, 1902, and no leave to depart the court was given to said Greene.

Ninth. That on the 6th day of March, 1902, in the United States court room in the city of Savannah, Georgia, the said Benjamin D. Greene was duly called to abide the order of said court on said indictment but failed to appear, and it was thereupon ordered by the court that said defendant, Greene, be given until 10 o'clock a. m. of March 7, 1902, to appear and abide the order of the court and that he do appear at that time to come into the said court room and abide the order of the court in the premises.

Tenth. That thereafter, to wit, at the said February term, 1902, of the said district court, and on the 7th day of March, 1902, at ten o'clock a. m., in the United States court room in the city of Savannah the said Benjamin D. Greene was duly called to come into court to answer the charges pending against him on said indictment and stand and abide by the orders of the court in the

premises, but the said Benjamin D. Greene made default, and thereupon a judgment was entered by the court on said obligation and recognizance forfeiting the same and adjudging that the United States of America recover against said Greene and said Leary jointly and severally the sum of $40,000, unless at the next term of court they should show cause why such order should not be final.

Eleventh. That the said Benjamin D. Greene did not at any time thereafter appear in said District Court of the United States for the Southern District of Georgia and show cause why the said judgment and an award of execution which had been made thereon should not be final; so that on the 12th day of January, 1903, the said court duly rendered final award of execution upon said judgment.

Twelfth. That on or about the 11th day of April, 1902, said James D. Leary departed this life intestate, and afterwards, to wit, on the 21st day of April, 1902, the intervenor, his widow, was duly appointed administratrix of his goods, chattels, and credits, and letters of administration having been granted to her, she duly qualified as such administratrix, and is now serving and acting as such.

Thirteenth. That on or about the 10th day of September, 1903, the United States of America brought suit against the intervenor in the Circuit Court of the United States for the Southern District of New York upon said recognizance of $40,000 above referred to, to recover the amount thereof; that such proceedings were fully had in said court as that a judgment was entered in said court on or about the 6th day of January, 1908, in favor of the United
91 States of America and against the intervenor upon said recognizance for the sum of $35,377.46, which said judgment amounting, with costs and interest, to the sum of $40,802.00, was paid by intervenor to the United States on or about December 31st, 1910.

Fourteenth. That the said four hundred (400) shares of Norfolk and Western stock has a present market value of $105.00 per share, in addition to the accumulated dividends thereon.

Fifteenth. Notwithstanding that the plaintiff in this suit has obtained an order restraining the defendant Luther Laflin Kellogg from devoting the said shares of Norfolk and Western Railway stock to the uses for which they were deposited with him and from delivering them to the intervenor so that she might use them or their proceeds in liquidating the judgment obtained against her in the southern district of New York upon said recognizance of $40,000, the plaintiff has pressed and collected said judgment against the intervenor, as is set out above.

Sixteenth. By reason of the premises the intervenor alleges that the defendant Luther Laflin Kellogg holds the securities mentioned in the bill of complaint herein and the dividends thereon, as trustee or depositary for and for the benefit and protection of the intervenor, and that intervenor's claim upon and right to said securities

is not liable to the claim of the plaintiff herein, except to the extent of any surplus remaining after making full indemnity to the intervenor, or if it be found that intervenor is not entitled to have the said stock or the proceeds thereof applied toward the repayment to her of the aforesaid judgment paid by her to the United States, intervenor alleges that the said defendant Luther Laflin Kellogg by reason of his contract to indemnify intervenor's decedent, as is set out in the fourth paragraph of this intervention above, is indebted and obligated to intervenor to pay to intervenor the sum of $40,802, with interest from the 31st day of December, 1910.

Wherefore the intervenor now prays that each and all of the original parties to this suit may be ordered to enter an appearance to this intervening bill and to show cause why the intervenor's claim should not be held to be valid and just and be allowed by the court, and that in the said order to show cause the plaintiff and the defendants may each be cited to appear herein and answer this intervening bill, though not under bond, oath, or affirmation thereto by any of the said parties, being expressly waived, and the intervenor prays that upon the hearing of the intervenor's bill a decree may be entered decreeing to the intervenor that the aforesaid 400 shares
92 of the stock of the Norfolk & Western Railway Company, together with such accumulated dividends thereon as may be necessary, or so much thereof as may be necessary in order to secure repayment to intervenor of the sum of $40,802, together with interest from December 31st, 1910, be transferred and turned over to intervenor, or that the said defendant Luther Laflin Kellogg be decreed to pay to intervenor the sum of $40,802, with interest from December 31st, 1910, and that intervenor may have all such further and other and general relief in the premises as the nature of her case may require or to equity shall seem meet.

MARY C. LEARY, *Intervenor.*

J. T. COLEMAN,
AUBREY E. STRODE,
Solicitors for Intervenor.

UNITED STATES OF AMERICA,
Southern district of New York:

Mary C. Leary, being first duly sworn, says that she is the intervenor herein; that she is the administratrix of the goods, chattels, and credits of James D. Leary, late of the county and State of New York, deceased; that she has heard the foregoing petition read and knows the contents thereof, and that the statements contained are true, as she believes.

MARY C. LEARY.

Sworn to before me and subscribed in my presence by the above named Mary C. Leary, this 17 day of May, 1913.

[SEAL.] M. V. KENNEDY,
Notary Public, New York County,
Notary Public, Richmond Co., N. Y.

Certificate filed in New York County. New York Co. No. 39.

No. 15408. Form 4.

STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify that M. V. Kennedy has
93 filed in the clerk's office of the county of New York, a certified copy of his appointment and qualification as notary public for the county of Richmond with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public, and believe that the signature to the annexed certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county, the 17th day of May, 1913.

[SEAL.] WM. F. SCHNEIDER, *Clerk.*

Endorsed: In the District Court of the United States for the Western District of Virginia. In equity. United States of America vs. Benj. D. Greene & al. Amended bill of intervention of Mary C. Leary, administratrix of James D. Leary, dec'd. (Original.) Filed May 20, 1913. Stanley W. Martin, clerk.

Service of the within amended bill of intervention and of a copy of the order of the court this day entered thereon is hereby acknowledged and copies received.

THE UNITED STATES OF AMERICA,
By MARION ERWIN,
Special Asst. to the Atty. Genl., Solicitor of Record.

Dated at Lynchburg, Va., this May 20, 1913.

In the District Court of the United States for the Western District of Virginia. Continued and held at Lynchburg, Va., on June 5, 1913.

In equity. Bill, &c. Filed in U. S. Circuit Court Dec. 19, 1903.

UNITED STATES OF AMERICA, COMPLAINANTS,
v.
BENJAMIN D. GREENE ET ALS., DEFENDANTS.

The defendant Luther Laflin Kellogg, having appeared specially and solely for the purpose of making a motion to strike from the amended bill of intervention, and the motion coming on to be heard, and having been heard this day, and the court desiring to be advised in the premises, it is ordered that the attorneys for Mary C.

94 Leary, administratrix, etc., intervenor, have ten days from this date within which to file a brief or memorandum on such motion, and within the same time to mail a copy of such brief or memorandum to Abram J. Rose, who specially appears as counsel for the said Luther Laflin Kellogg; that said Rose have seven days after the receipt of such brief or memorandum to file, if he desires, a replying memorandum.

It is further ordered that the time for the defendant Luther Laflin Kellogg to appear by general appearance, or to file an answer to the bill of intervention, be, and the same hereby is, extended until fifteen days after the entry of an order upon the decision of this court on the motion to strike of said Kellogg, in case such motion should be overruled, and that the intervenor is given two months from the time of the filing of said answer of said defendant Luther Laflin Kellogg within which to take testimony on her behalf as against him, and the said Luther Laflin Kellogg, if an answer is filed by him, is given thirty days after the taking of the testimony of the intervenor as against him within which to take testimony in rebuttal. The said time for taking the testimony may be enlarged by stipulation of counsel for the intervenor, Kellogg and the United States, or by order of court.

The order hertofore made in this action on the 20th day of May, 1913, is modified in accordance with the provisions of this order, but stands in every other respect, and nothing herein contained is intended to change the time within which testimony is to be taken on the part of the intervenor against the United States, or the defendant Kellogg on the original bill of intervention or on the part of the United States against the intervenor as hereinbefore fixed by said order of May 20th, 1913.

J. T. C.
M. E.
A. J. R.

Dated June 5, 1913.

[Endorsed:] Order. Enter: Henry C. McDowell, district judge. Entered June 5th, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

95 In the District Court of the United States for the Western District of Virginia. Continued and held at Lynchburg on June 30, 1913.

UNITED STATES
v.
BENJ. D. GREENE ET AL.

This cause came on again to be heard and upon consideration of the motion of L. L. Kellogg to strike from the amended bill of intervention of Mary C. Leary, admx., certain parts thereof, and of

the arguments of counsel, it was, for reasons reduced to writing and this day filed,

Ordered, decreed, and adjudged:

(1) That in so far as said motion relates to paragraph four of said amended bill it be overruled;

(2) But that in other respects said motion be sustained, and that the following words of paragraph 16 of said amended bill, to wit:

. . . "or if it be found that intervenor is not entitled to have the said stock or the proceeds thereof applied towards the repayment to her of the aforesaid judgment paid by her to the United States, intervenor alleges that the said defendant, Luther Laflin Kellogg, by reason of his contract to indemnify intervenor's decedent, as is set out in the fourth paragraph of this intervention above, is indebted and obligated to intervenor to pay to intervenor the sum of $40,802, with interest from 31st day of December, 1910," . . .

and also the following words in the prayer of said amended bill, to wit:

. . . "or that the said defendant, Luther Laflin Kellogg, be decreed to pay to intervenor the sum of $40,802, with interest from December 31st, 1910," . . .

be treated as stricken from said amended bill of intervention.

[Endorsed:] Decree of June 30, 1913. Enter, Henry C. McDowell, district judge. Entered June 30, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

96 In the District Court of the United States for the Western District of Virginia.

In equity. Bill, &c. Intervention of Mary C. Leary, administratrix.

THE UNITED STATES OF AMERICA, COMPLAINANTS,
vs.
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk & Western Railway Co.

Answer of the United States to bill of intervention of Mary C. Leary, administratrix.

The answer of the United States of America to the bill of intervention of Mary C. Leary, administratrix of James D. Leary, deceased, in the above stated cause:

These respondents, the United States of America, now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised is material or necessary for them to make answer to, answering say and aver:

(1) Respondents admit the allegations of paragraph number "first" of said bill of intervention.

(2) For answer to the paragraph numbered "second" of said bill of intervention, respondents say they admit that on or about the 14th day of December, 1899, the said Benjamin D. Greene was arrested in the city of New York upon a warrant issued by John A. Shields, United States commissioner for the southern district of New York, based on said indictment and complaint, and was required by said commissioner to give bail in the sum of $20,000 for appearance before said commissioner from time to time as required for examination before said commissioner, and on said 14th day of December said James D. Leary became bail for said Greene on a bond or recognizance in the sum of $20,000.

That thereafter, to wit, on the 20th day of February, 1900, the said commissioner found probable cause of guilt of the said Benjamin D. Greene and committeed said Greene to the custody of the United States marshal for the southern district of New York to await a warrant of removal of the said Greene to Georgia from the judge of the District Court of the United States for the South-
97 ern District of New York, and thereby said $20,000 bail bond became and was cancelled and exonerated.

That thereafter, to wit, on or about the 20th day of February, 1900, the said Benjamin D. Greene entered into a bail bond in the sum of $25,000 for his appearance before the said judge, the Honorable Addison Brown, for hearing on application for said warrant of removal, and to abide the further order of the said judge, and said Leary became bail for said Greene on said bail bond.

That thereafter, to wit, on or about the 26th day of June, 1900, the said district judge referred the case back to said commissioner and directed the taking of further competent testimony as offered by either party and ordered that the said Greene appear before the said commissioner and attend such further taking of testimony.

That thereafter, to wit, on March 21, 1901, the said commissioner, having taken such other and further testimony, made his finding of probable cause of guilt of the defendant and certified the same to the said district judge.

And thereafter, to wit, on or about the 28th day of May, 1901, the said district judge did issue his warrant to the marshal of the United States for the southern district of New York commanding the said marshal to take into custody and to remove the said Greene to the southern district of Georgia and deliver him to the marshal of that district, and that said marshal took said Greene into custody as so ordered, and thereby the said $25,000 bail bond given on February 20, 1900, by said Greene, with said Leary as bail, became and was exonerated and all liability thereon ceased and terminated.

And thereafter, to wit, on the 28th day of May, 1901, the said judge enlarged the said Greene upon a bail bond for appearance in Georgia in the sum of $25,000, on which bail bond the said James D. Leary was bail.

And thereafter, to wit, on or about the 8th day of June, 1901, the said James D. Leary surrendered up the said Benjamin D. Greene into the custody of the United States marshal for the southern district of New York, and said $25,000 bail bond became and was thereupon cancelled and exonerated on the said 8th day of June, 1901. Otherwise the averments of said second paragraph are denied.

(3) For answer to the paragraph numbered "third" of said bill of intervention these respondents say:

On information and belief they deny that at the time therein mentioned the said Luther Laflin Kellogg was the attorney of the said Leary, and admit that he was one of the attorneys of said
98 Greene in the conduct of said removal proceedings, but this respondent has no knowledge or information sufficient to form a belief as to who applied to the said Leary to go on the bail for $25,000 therein referred to, and if deemed material require proof of the same.

And these respondents deny the averment of said paragraph of said bill of intervention that at the time said Leary consented to become such bondsman of bail and did sign and execute said bail bond in the said sum of $25,000 the said Greene at the same time placed in the hands of his said attorney, Luther Laflin Kellogg, as trustee and depositary to secure said Leary against any loss which he might sustain by reason of his becoming such bondsman three hundred shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company upon the condition and understanding that said Kellogg should hold said shares of stock in trust for said Leary until said Leary was released from said bond, or in case that said Leary's liability thereon should be established that said shares of capital stock should be applied in payment of the obligation assumed by said Leary. And if the said averments or any part thereof be deemed material requires strict proof of the same.

And on information and belief respondents say that the only shares of stock of the Delaware, Lackawanna & Western Railroad Company which the said Kellogg received from said Greene, and which Kellogg had in his possession subsequent to the arrest of said Greene in December, 1899, as aforesaid, were 400 shares of said stock of which the certificates representing the same were transferred to said Kellogg by said Greene and were sold by the said Kellogg through A. W. Kilborne & Co., brokers, on March 23, 1900, for the sum of $35,791.50 cash, which sale was made subsequent to the time when the bail bond executed at the time of Greene's arrest by Greene with Leary as bail had been exonerated on February 20, 1900, and said Leary had been released from all liability thereon.

And these respondents deny the further averment in said paragraph of said bill of intervention, that thereafter said shares of stock (meaning said Delaware, Lackawanna & Western Railroad Company stock) were withdrawn by said Greene from the custody of said Kellogg and said Greene deposited with said Kellogg in lieu thereof four hundred (400) shares of common stock of the Norfolk and

Western Railway Company (being the shares referred to in the bill of complaint), to be held by the said Kellogg upon the same terms and conditions as those upon which said Delaware, Lackawanna & Western stock was originally deposited with him.

And on information and belief these respondents aver and
99 say that the said $35,791.50 proceeds of the sale made on March 23, 1900, of said Delaware, Lackawanna & Western Railroad Company stock were on the said 23rd day of March, 1900, invested in part payment of 1,000 shares of Canadian Southern Railway Co. stock numbers 25062 to 25071, inclusive, purchased on said day by said Kellogg through the said Kilborne & Co. for the sum of $51,775.00, the balance of the purchase price being paid by the proceeds of other stocks sold by said Kellogg for said Greene.

And on information and belief these respondents say that on March 26, 1900, the said Kellogg purchased for the sum of $18,812.50, through said Kilborne & Co., 500 shares of stock of the Norfolk & Western Railway Company, represented by certificates numbers 298, 2368, 2369, 2370, 5885, 9857, 10225, and 10427, issued in the name of said Luther Laflin Kellogg, and subsequently changed into certificates numbers 5895 to 5898, inclusive, 11077 and 74200, aggregating said 500 shares.

That the said Norfolk & Western Railway Co. stocks were not purchased with the proceeds of said Delaware, Lakawanna & Western Railroad Co. stock, but were purchased with the proceeds of other stocks and funds which the said Kellogg held for said Greene, and which stocks Kellogg had sold through the said Kilborne & Co. on March 23, 1900, and on March 26, 1900, to wit, part of the proceeds of 600 shares of Canada Southern Railway Co. stock sold on March 23, 1900, and 100 shares sold on March 26, 1900. The said Canada Southern Railway Co. stock so sold being other and different shares from those bought on March 23, 1900, with the proceeds of said Delaware, Lackawanna & Western Railroad Co. stock.

4. In answer to the averments of the paragraph numbered "fourth" of said bill of intervention, these respondents admit that the answer of said Luther Laflin Kellogg to the original bill of these respondents is correctly quoted in said paragraph, but these respondents say that said averments of the said answer of said Kellogg are contradictory of the averments of said bill of intervention as to what was the alleged contract on which intervenor's claim to said Norfolk & Western Railroad Co. is based, and in as much as the said intervenor does not allege that the said averments in the answer of the said Kellogg are true, these respondents say that said averments of said fourth paragraph of said intervention are irrelevant to any claims asserted by said intervenor against the said Norfolk & Western Railroad Co. stocks or against these respondents.

And subject to the foregoing objections, for further answer to the averments of said fourth paragraph of said intervention these
100 respondents say that the facts relative to the bail bonds given by said Benjamin D. Greene with said James D. Leary as

surety, which are incorrectly stated in the said answer of said Kellogg are in truth and in fact stated in the answer of these respondents in answer to the third paragraph of said amended bill of intervention, and are not stated correctly either in said answer of said Kellogg or in said amended bill of intervention, and these respondents, on information and belief, deny that there was ever any agreement between the said Greene or on the part of said Kellogg and the said Leary whereby the said Norfolk & Western stocks were to be held by the said Kellogg, either to indemnify the said Leary or to indemnify the said Kellogg, in consideration of the said James D. Leary having become surety on the said $40,000 bail bond executed by the said Greene with the said Leary as surety on the 20th day of January, 1902, and if there were any such agreement relative to the $25,000 bail bond referred to in the intervention of said Leary and in the answer of Kellogg, if the same be relevant or competent, these respondents require that the same be strictly proved. And these respondents deny that the said Norfolk & Western Railroad Co. stocks were securities substituted for said Delaware, Lackawanna & Western Railroad Co. stocks as security, or indemnity for said Leary of said Kellogg, and on information and belief say that the facts relative thereto are correctly stated in the answer of these respondents to the third paragraph of said amended bill of intervention.

5. In answer to the averments of the paragraph numbered "fifth" of said bill of intervention, these respondents admit that a warrant was duly issued on the 28th day of May, 1901, by the district judge for the southern district of New York directing the removal of the said Benjamin D. Greene to the State of Georgia for trial upon the aforementioned indictment, and that thereupon, to wit, on the 28th day of May, 1901, said Benjamin D. Greene was admitted to bail in the sum of $25,000 by said district judge for his appearance in Georgia for trial upon said indictment and that said James D. Leary became his bail upon said bond, but these respondents deny that said bond was the bail bond dated January 20, 1902, upon which the right of action of the intervenor in the present intervention is predicated.

6. In answer to the averments of the paragraph of said bill of intervention numbered "sixth," if the same is intended to apply to the bail bond required to be given and given on May 28, 1901, referred to in paragraph "fifth" of said bill of intervention, the respondents, on information and belief, deny the same. And
101 for further answer thereto these respondents say that after said Leary had become bail for said Greene on said bail bond of $25,000, executed May 28, 1901, subsequently on the 8th day of June, 1901, the said Leary, as such bail, delivered up said Greene, his principal, to the marshal of the southern district of New York in the city of New York, before the Honorable E. Henry Lacombe, U. S. circuit judge, and thereupon the said bail bond so given by said Leary as bail for said Greene became and was exonerated, and

all claims of said Leary for indemnity, whether for said Greene or from said Kellogg or on any property in their hands, if any such ever existed, had become ended and terminated on June 8, 1901.

And for further answer to said paragraph of said bill of intervention these respondents say that the said Benjamin D. Greene, being then in custody of said marshal under said warrant of removal, did, on the 8th day of June, 1901, apply to the Circuit Court of the United States for the Southern District of New York for a writ of habeas corpus, alleging that he was being held illegally in the custody of the marshal and praying his discharge as hereinbefore stated, and on denial of said writ of said circuit court appealed from the order of denial to the Supreme Court of the United States, and that over seven months thereafter, to wit, on the 17th day of January, 1902, the mandate of the Supreme Court affirming said denial was made the judgment of the circuit court, and that on the 20th day of January, 1902, the said Benjamin D. Greene as principal and said James D. Leary as surety entered into a recognizance or bail bond in the sum of $40,000 for the appearance of the said Greene before the United States District Court for the Southern District of Georgia.

And these respondents, on information and belief, deny that there was any agreement on the part of the said Greene, or of any one else competent to bind him, with the said James D. Leary at the time of the giving of said bail bond of January 20, 1902, or in connection therewith, by which any securities held in trust or on deposit by said Kellogg for Greene, should remain and continue in the hands of said Kellogg as security and indemnity to the said Leary for signing said $40,000 bail bond of January 20, 1902.

7. In answer to the paragraph of said bill of intervention numbered "seventh" these respondents aver and say:

These respondents admit that the copy of the bail bond or recognizance set out in said paragraph is a true copy of the original bail bond executed on January 20, 1902, by said Benjamin D. Greene as principal and said James D. Leary as surety, except that the original bail bond recites that the said Benjamin D. Greene presented
102 his application for writ of habeas corpus on June 8, 1901, whereas the copy erroneously gives the date of said application as May 28, 1901.

But these respondents deny on information and belief that said James D. Leary did jointly with said Greene make, execute, and deliver the same upon the understanding and agreement alleged in the fifth paragraph of said bill of intervention.

8. These respondents admit that the averments of the paragraphs of said bill of intervention numbered "eighth," "ninth," "tenth," "eleventh," and "twelfth."

9. These respondents admit that the averment of the paragraph of said bill of intervention numbered "thirteenth" is true, but say that after said judgment for $35,377.46 had been rendered against said intervenor, instead of paying the same she allowed the interest

to accumulate and was so stubbornly litigious in contesting the payment of the same that a large part of the costs paid on said judgment were awarded against the said Mary C. Leary individually.

10. In answer to the averments in paragraph numbered "fourteenth" of said bill of intervention these respondents say that the value of the said 400 shares of stock of the Norfolk & Western Railway Co. with the accumulated dividends thereon is greater than the amount claimed by said intervenor to have been paid on the said judgment against said Mary C. Leary, administratrix.

11. In answer to paragraph numbered "fifteenth" of said bill of intervention these respondents admit that the order of injunction granted in said cause has the effect of restraining pendente lite any disposition or transfer of said Norfolk & Western stock by said Kellogg or by said Norfolk & Western Railway Co.

12. In answer to paragraph of said bill of intervention numbered "sixteenth" these respondents deny that the said defendant Luther Laflin Kellogg holds the securities mentioned in said bill of intervention, to wit, the said 400 shares of stock of the Norfolk & Western Railway Co. and the dividends thereon as trustee or depositary for, and for the benefit and protection of the intervenor, and that intervenor's claim upon and right to said securities is not liable to the claim of the plaintiff herein except to the extent of any surplus remaining after making full indemnity to the intervenor.

And these respondents for further answer to said paragraph of said bill of intervention say the three hundred shares of stock of the Delaware, Lackawanna & Western Railroad Company referred to in the second paragraph of said intervention were part of a
103 block of 400 shares of stock of said Delaware, Lackawanna & Western Railroad Company, and which were sold by said Kellogg March 23, 1900, as hereinbefore set forth, and the same as well as the 600 shares of stock of the Canada Southern Railway Co. sold by said Kellogg on March 23, 1900, and the 100 shares of Canada Southern Railway Co. stock sold by said Kellogg on March 26, 1900, all constituted and were investments made by said Benjamin D. Greene with a part of a fund of $722,528.03 constituting the share of Benjamin D. Greene in the funds belonging to the United States misappropriated and embezzled from the United States through the conspiracy between the said Benjamin D. Greene, John F. Gaynor, Oberlin M. Carter, and others to defraud the United States, as set out with more particularity in complainants bill in the main cause herein. That in equity the said stocks belonged to and were the property of the United States and were not the property of the said Greene or of the said Kellogg at the time the same were placed in the hands of said Kellogg by the said Greene, and that at the time it is claimed in said bill of intervention that said James D. Leary acquired an interest legal or equitable in said Delaware, Lackawanna & Western Railroad stock, and neither the said Greene nor the said Kellogg had any interest in said stocks, which they or either of them could legally or equitably pledge or convey to the said Leary, or that

he could acquire, and that neither the said Greene nor the said Kellogg had any interest in the proceeds of the said stock, nor in the investments thereof when the same were sold and reinvested by the said Kellogg in March, 1900, as hereinbefore set forth, and especially did neither the said Greene nor the said Kellogg have any interest in the 400 shares of Norfolk & Western stock purchased by said Kellogg on March 26, 1900, as hereinbefore stated, which they or either of them could legally or equitably pledge or convey to the said Leary, and that said Leary was on full notice at the time he became bail for said Greene on said $40,000 bail bond executed January 20, 1902, that he could not acquire any interest in said stocks, except subject to the antecedent equities of the United States existing therein, and which antecedent equities and rights in said stock existed in the United States by reason of the facts averred in this answer and in the facts averred in complainants bill in the main cause, which are made a part of this answer.

Wherefore these respondents say that the prayers of said intervenor should be denied with costs.

THE UNITED STATES OF AMERICA,
By MARION ERWIN,
Special Asst. to the Attorney General.

104 Endorsed: Original answer of the United States to the amended intervention of Mary C. Leary, administratrix. Filed June 9, 1913. Stanley W. Martin, clerk.

In the District Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA
against
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and The Norfolk & Western Railway Company.

Amended answer.

The separate amended answer of Luther Laflin Kellogg to a bill of complaint exhibited against him and others by the United States of America in the Circuit Court of the United States for the Western District of Virginia.

This respondent, L. L. Kellogg, not waiving his demurrer by him heretofore filed, but insisting on the efficiency thereof to dispose of all claim asserted or capable of being asserted against him by the said complainant in the said bill, or otherwise, and saving and reserving unto himself the benefit and advantage of all and all manner of exceptions which can or may be had or taken to the manifold errors, uncertainties and insufficiencies in the said bill contained, for answer thereto, or to so much and such parts thereof as he is advised it is material he should make answer, answering says:

I. That this answer is made under oath and is intended to be used at once as an answer, and in season as an affidavit in any sort of proceedings.

II. That he is informed and believes that all the fundamental and material allegations of the said bill are untrue.

III. That he has been informed and believed and now does believe that the contracts specified or mentioned in the bill of complaint were properly obtained, and properly and carefully executed in accordance with the specifications, and that the complainants received from the contractors full value for every dollar it paid them on account of said contracts.

IV. That he has been informed by all the parties charged in the bill with having entered into a conspiracy, except Connelly whom he never saw, that there was no conspiracy, as alleged in said bill to defraud the United States, or of any other kind; but that the work done by the contractors under the several contracts was properly performed, and that the amount paid was only the stipulated amount mentioned in the contracts.

V. The respondent further says, upon his oath, that the charges in the bill, of knowledge of respondent of any such fraud as alleged or pretended to be alleged in the bill in relation to the making of the contracts, or their execution, is false and untrue; but he affirms that he has never, at any time nor has he now, any such knowledge or notice.

That after these preliminary general denials, which this defendant desires to be made and taken as broad and comprehensive as possible, respondent will take up the specific allegations of the bill, and as to them he says:

VI. That he has information and believes that the first paragraph of the bill, as it appears on page 2 under the heading "Carter's duties, powers, and discretions," in so far as it states who Carter was and what his business was during the time therein mentioned, is true.

VII. That with reference to the specifications of his powers, duties, and discretions following such general statement, respondent says:

That he is informed and believes the following facts are true, namely: That Carter did have certain duty with reference to proposing to his superiors projects for the improvement of rivers and harbors; with reference to proposing projects for the expenditure of moneys for such improvements; with reference to devising and drafting specifications for contracts for such improvements; with reference to drafting and proposing forms of advertisements giving notice that bids would be received; with reference to proposing to his superiors, as part of the specifications, the time within which the successful bidder should be required to commence work; and with reference to suggesting to his superiors modifications of contracts.

That with reference to each and every one of the last mentioned items his power and duty was solely to suggest to his superiors or to propose to them the various matters therein specifically set out.

That in the case of each and every contract mentioned herein Carter performed such duty; that with regard to the project for improvement, project for expenditure, specifications for contracts, the form of advertisements, the fixing of the time when work should begin, and the modification of contracts, every act of Carter, with reference to each and every one of the contracts mentioned in the bill was approved by his superior officer and directions given to him to execute the same, and that the failure on his part to comply
106 with such direction (which was equivalent to a military order) would have rendered him liable to be court-martialed.

That each of these contracts was let upon specifications approved by Carter's superior officers, either the Chief Engineers or the Secretary of War, after advertisement in the form fixed by the Chief Engineers or the Secretary of War, and for the time and in the papers ordered and directed by the superior officers of said Carter.

The defendant is informed and believes the statement to be untrue, and he denies that Carter had power, duty, and discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids, as alleged in the bill; and, on the contrary, states the fact to be that he was required by the rules and regulations to send the form of advertisement and a statement of what papers it would be published in, and the number of times that the publication would be had, to his superior officers for their approval, and that in each and every case of the contracts mentioned in the bill that this was done, and the advertisement was published in the papers, and for the time fixed by his superior officers.

That Carter did have power, duty, and discretion in giving information in regard to such contracts to be let.

The respondent is informed and believes that in every instance during his entire term of being in charge of the Savannah district he gave out to every person properly entitled thereto all information in regard to the various works or the contracts to be let.

VIII. That with regard to his power, duty, and discretion as to receiving proposals and recommending to his superiors the awarding of contracts, that that statement of the bill is true.

That Carter did receive bids for the contracts mentioned in the bill and did recommend to his superior officer the letting of the contracts to certain parties. That in every instance but one his recommendation was to let the contract to the lowest bidder, and such recommendation was approved by his superior officer. That in the case mentioned the recommendation was not made to the lowest bidder for the reason that such lowest bidder was a failing or defaulting contractor in the performance of contracts with the United States, and under the law and regulations was debarred from being awarded another contract.

That Carter did have power, duty, and discretion with regard to superintending the work being done by contractors in said district or in approving or rejecting material.

That in the exercise of such power, duty, and discretion with regard to the contracts mentioned in the bill, Carter appointed
107 engineers and inspectors upon the work, some of whom have since testified as witnesses for the Government, whose duty and instructions were to carefully watch and inspect the performance of the work under the contract, and to make in writing to Carter, or to the engineer office at Savannah, reports every ten days of the progress of the work and of the amount of work performed and as to whether it was done in accordance with the specifications. That the aforesaid inspectors and assistant engineers did so make such reports, and that the same were on file in the office of the engineer at Savannah, and that in each instance it stated that the work was done in accordance with the contract; was signed and certified to by the engineer making it as being true and correct, upon his honor.

That Carter did have power, duty, and discretion in approving the accounts for said work under said several contracts. That, as a matter of fact, the method of rendering such accounts was that the employees of the engineer's office under said Carter, from the before mentioned trimonthly report, made computations and calculations of the quantity of work done and performed by the several contractors, and of the amount due them for such work, and notice of such amount then sent to the contractors. That until such report and computation was made and notice given, the contractors did not know and had no means of knowing how much work they had done or what there was due him or them.

That in the case of each and every contract mentioned in said bill the account for work done was made as hereinbefore stated, and was correct and true and based entirely upon the reports of the officers and agents of this complainant; and that the payments made for such work were in accordance with such report, at the rates fixed by the contract, and that the amount paid was only the amount that was due to them for the work actually performed.

IX. The defendant further says that with regard to the second portion of said bill, under the head "The scheme devised to defraud," that defendant is informed and believes that no part of said portion is true, and he denies it.

That there was no such conspiracy, as alleged therein, to defraud the complainants, or to get the work done at greater prices than should properly have been paid; or that Carter or the persons therein mentioned in any way during the said time engaged in any conspiracy of any kind or of the character therein set forth and stated.

X. And the respondent further denies, on information and behalf, all that portion of the bill under the head "III," being entitled "The scheme to defraud put in operation," and alleges:
108 That his information is that there was never any scheme to defraud put in operation, or that cheaper or inferior material and work was done, or work not in accordance with the specifications was allowed or paid for. That on the contrary, rigid compliance

with the specifications was required by said Carter and carried out by the various contractors.

XI. The defendant further says that with regard to that portion of the bill, under the number "IV," entitled "Description of the engineering work,"

That he has no knowledge or information in regard thereto. He has seen or made an examination of most of the contracts mentioned in the bill, but that no such diagrams or drawings as shown by Exhibits "A," "B," "C," and "D" were annexed to said contracts, or made part thereof, but that the same are purely theoretical drawings of what it is contended by enemies of Carter and persons differing with him as to the engineering features of the work, should have been required under these contracts. That as to the theories set forth in this portion of the bill, or as to any alleged fact therein stated as to the cost of the mattresses therein mentioned, or as to the inferences which are sought to be drawn from the statements therein contained, the respondent has no knowledge; but is informed and believes that the theories are wrong, the facts not correctly stated and the inferences unwarranted.

XII. This defendant further says with regard to that portion of the bill numbered "V," headed "Details of the fraud introduced into and under the contracts," that he avers, upon information and belief, that each and every statement as to alleged facts, if there be any stated in the said portion of the bill down to and including the first six lines on page 23, is untrue, and that there was no such act done for the purpose therein specified, as therein stated, to defraud the United States; but that wherever a change was made from one kind of mattress to another, it was done within the contract, for the sole purpose of enabling the work to be done properly, to meet the engineering difficulties of the situation as they presented themselves, and was without fraud or intention to defraud the United States.

That it is true, as this respondent is informed and believes, that certain contracts were let to the parties named; and that as this defendant is informed and believes, the numbers of the contracts in the Savannah district, the date of the contract, and the party who was the contractor is accurately specified and set out in said paragraph at page 23 of the said bill.

This defendant has no knowledge as to whether the allega-
109 tions of this part of the bill, that these contracts were for the benefit of and operated by the so-called conspirators, as stated therein, but his information is that Carter and Connelly had no interest therein.

The respondent, however, calls attention to the fact that in none of these contracts as therein set out does co-defendant, Benjamin D. Greene, appear to be the contractor or to be interested therein; nor is such fact stated in this bill, except inferentially.

XIII. This defendant further says, upon information and belief and alleges, that every statement in the concluding portion of said part of the bill numbered "V," as the same appears on page 24 of

the bill, is untrue, and they are denied, and he alleges that the complainants were not defrauded; that cheap and inferior material, not in accordance with the specifications of the contracts, was not put in the work; nor were there any payments made to the contractors for such work at high and exorbitant prices, but that the same was only paid for at the contract price, such price being the price approve by Carter's superior officers before the work was charged; and that the work was in all respects properly done and performed.

XIV. The respondent further says that if it be the claim of this bill to connect the said co-defendant, Benjamin D. Greene, with the Atlantic Contracting Company, who, it is charged and admitted, was the contractor for the two contracts 6515 and 6517, both dated October 8, 1896; that as this defendant is informed and believes, the fact is with regard to said contracts that said Greene was a stockholder of said Atlantic Contracting Company; that said contracts were properly let and, in so far as permitted by the Government, properly performed; that in the months of July, August, September, and October the contractor, the Atlantic Contracting Company, was engaged in the performance of said contracts and did a large quantity of work; that the contracts provided that they were not obliged to work in advance of an appropriation; and that sometime in October, 1897, there being no appropriation available for payment of work done under these contracts, they suspended work, having earned a large amount of money, which the Government had not paid; that an appropriation became available for the payment of this work on the first day of July, 1898, and that thereafter the said Atlantic Contracting Company demanded payment from the complainants for the work done, which, under the terms of the contract was then due, and that the said complainants refused to make such payments, thereby committing a breach of the contract between the complainants and the contractor; that prior to that time, and
110 about the month of November, 1896, to the 1st of July, 1897, the said Atlantic Contracting Company had done and performed a very large volume of work under these two contracts, and the Government had retained in its possession (in accordance with the terms of the said contracts) ten per centum (10%) of the amount of work done, and that by reason of the breach of the contract, above set forth, on the part of the complainants herein, in refusing to pay the amount that was justly due and owing to the contractor, this reserved percentage became due and payable.

That about a year after the said breach of the contract, as above set forth, the complainants, in spite of their breach, as above stated, sought to annul said contract by requiring the said contractor to proceed with the work, and on its failure to do so, they declared the contract annulled. The said declaration was based not upon any fraud in obtaining the contract or in its performance, but solely because the contractor refused to proceed.

This respondent says further, that thereafter and in January, 1900, the Atlantic Contracting Company, with the defendant's firm

as attorneys, duly commenced actions in the Court of Claims to recover from the complainants herein the amount earned by the contractors on the two said contracts, and also profits that they would have earned if allowed to complete the contracts in accordance with their terms, which they were prevented from earning by reason of the breach of the contract as hereinbefore set forth.

That the amount due the said contractor, as appears by the petitions in said Court of Claims, is $359,139.69 for money earned, and $600,000 for profits.

That the said actions in the Court of Claims have been diligently prosecuted, and there has been no default or delay on the part of the claimant therein.

If the co-defendant, Benjamin D. Greene, is to be charged with the receiving of moneys, as alleged in this bill, he should be given credit for the amount due from the Government in these actions of the Atlantic Contracting Company against the United States, for upon a equitable settlement of the accounts, the United States owes the Atlantic Contracting Company, who in this bill is treated as if it were identical with Greene, and therefore owes Greene instead of Greene owing the Government the large amount set forth in the bill herein.

XV. This defendant further says that upon information and belief, he denies that portion of the bill numbered "VI" and headed "The division of the money"; but he is informed and believes that Carter, mentioned therein, never received any division of these
111 moneys, but that Robert F. Westcott, who was the father-in-law of Carter, had certain contractural engagements with the contractors, or some of them, and advanced moneys and was paid the same by them, and had some interest in the said contracts.

What interest it is of this complainant, what was done by the contractors with their money so long as the contracts were properly obtained and the work properly done, this defendant is at a loss to understand.

XVI. With reference to the portion of the bill numbered "VII" headed "Greene's investments,"

This respondent denies that the amount set forth in the schedule on page 30 states in any way the profits on said contracts received by the said Greene. It will be noticed that nothing is taken into consideration in this part of the bill, nor in any part of it for that matter, of the amount of money necessary to perform the various contracts, or required to be expended for work, labor, and material in its performance; but this bill treats as profits, and alleges to have been divided, the gross amount received from the Government on these contracts.

This defendant denies that these alleged profits, which were paid the contractors, if they came into the hands of Greene, constituted in his hands, or in the hands of anybody, with or without notice, a trust fund for the benefit of the complainant.

XVII. The respondent denies specifically that Exhibit "F," purporting to be a table "setting forth certain of the proceeds of said fraudulent profits from the share of the same retained by said Benjamin D. Greene, aggregating $113,926.55, have been traced into the possession of" this defendant.

That as to the Exhibit "F," mentioned by this part of the bill, the respondent will deal with that later in this answer.

XVIII. This defendant further says as to that part of the bill numbered "VIII" headed "The board of inquiry," he has no knowledge or information as to many of the matters therein stated, but that he denies in every way as fully as possible that he ever received any information, or that he now believes that there was any evidence produced before the said board of any kind showing the conspiracy, as alleged therein; that he knows nothing of the reasons that Robert F. Westcott, in that part mentioned, had for not going before said board, but that he was shown the original letter from Westcott, of which the following is a copy:

"RICHFIELD SPRINGS, *October 18, '97.*

"MY DEAR OBERLIN:

I have your telegram; also telegrams from Colonel Gillespie
112 asking me, as you have done several times, to come before the board to testify. You know my disposition towards you, but do you see any reason—I do not—why I should submit my private affairs to this board, either by furnishing the accounts to which you refer or by being examined personally? I must decline to do so. The account referred to relates to many matters of a private character with which you have had nothing to do. As to matters with which you have had to do, I have given you powers of attorney, as to my moneys and property, under which you have acted for years because of your close personal relations. For the same reason I have given you money for your own use. I understand that those matters have been proven to the board, but I do not see that they are properly within the inquiry or that I should testify about them. As to coming before the board personally, you know that my health is such as to make this hazardous, a consideration which I should put aside if I thought I ought to be examined. The telegram from Colonel Gillespie is a very courteous one. Please explain to him with like courtesy my position.

"Affectionately,

"R. F. WESTCOTT.

"To Captain CARTER."

and was told by Carter and others that the ill health of Westcott and his disinclination to have the board of inquiry pry into his private business matters was the reason for his not going before the board.

XIX. The respondent further says, with reference to that part of the said bill beginning on page 34 and continuing down to page

36, under the headings "The court martial," and "The appeal," that he believes the statements therein; that there was a court martial, and that Carter was convicted by said court martial; and there were habeas corpus proceedings had by Carter, and in both the court martial and the habeas corpus proceedings the respondent's firm acted as counsel, are true.

That with reference to any other statements therein contained which in any way charge defendant with any notice or knowledge of any fraud on the part of the contractors or Carter, this defendant denies that there was such notice or knowledge.

XX. That with reference to the review of the evidence by the Attorney General, as stated on page 36, the complainant has omitted to state what the respondent alleges the fact to be:

That shortly after the decision of the court martial, the evidence and decision were referred to Hon. George F. Ed-
113 munds, formerly United States Senator from Vermont, by Mr. McKinley, then President of the United States.

That Mr. Edmunds, one of the ablest and most accurate of lawyers, carefully examined the same and made a report to the President of the United States, and that in and by said report he found, and stated as his conclusion, that there was not sufficient evidence before the court martial to warrant their finding Carter guilty of the charges of conspiracy to defraud the United States, as alleged in the charges and specifications before said court martial and referred to in the bill.

XXI. The respondent further says, with reference to that part of the bill entitled "The indictment of Greene and the Gaynors, et al.:"

That it is true, as therein stated, that on or about the 8th day of December, 1899, the grand jury for the southern district of Georgia found a bill against the parties therein mentioned and named, charging them with a conspiracy to defraud the United States.

That the trial of said indictments was set for the 17th day of March, 1902, and at that time Edward H. Gaynor and William T. Gaynor appeared in court ready for trial, but that the same was not moved, but that the trial was postponed indefinitely.

That sometime in November, 1903, Carter (whose term of imprisonment under the said court martial and decision had expired) was released from Fort Le'vernworth, Kansas, where he had been confined, and the Government took no steps to bring him to trial upon said indictment pending against him in the State of Georgia.

XXII. He further says, with reference to that part of the bill entitled "The hearing for removal," that the facts with regard to the hearing, the officers before whom it took place, and the proceedings in court are stated with substantial correctness, and that respondent's firm di[illegible] act for Benjamin D. Greene and John F. Gaynor, therein mentioned.

But this defendant denies that in the conduct of said proceedings the said firm admitted that the proof established the fact that the profits of said contract had been divided into thirds, one-third to Greene, one-third to Gaynor, and that the other third had gone indirectly to Oberlin M. Carter; that it was established on said hearing that Robert F. Westcott had, before these contracts were made and while some of them were being performed, been engaged and interested in other business with Greene and Gaynor, or one or both of them; that he had used his efforts to obtain contracts for the doing of work on the Delaware, Lackawanna & Western Rail-
114 road Company, with which road he was indirectly connected, in which contracts he was to be interested; that he had furnished to Greene and Gaynor money to pay for the carrying on of the contracts with the United States Government, or some of them; that he admitted having received large sums of money from these contractors at various times.

XXIII. The respondent reiterates his denial that in this removal proceeding, or in any proceedings, he got information sufficient to warrant a belief that there had been any conspiracy to defraud the United States between the parties mentioned, nor did he ever have any notice of any fraud upon the Government. The evidence on such proceedings, on the contrary, convinced this respondent that there was no conspiracy, and that the Government was not defrauded of a dollar.

XXIV. He specifically denies that part of the bill in which is stated:

"Your orators aver and charge that in order to prevent your orators from recovering from the said Benjamin D. Greene the large amount of investments into which he had diverted the said money of the United States so fraudulently obtained, the said Benjamin D. Greene set about concealing the same by making other people the holders thereof, but secretly for his benefit."

In so far as it is sought in any way to connect this respondent with the stat'ment, it is denied, and he alleges on information and belief that no such act or acts were done by the said Greene.

XXV. This defendant now desires to take up the Exhibit "F," and to specifically state his connection and relation with the said securities mentioned in said exhibit.

It will be noticed that as to the item Oct. 12, 1898, $5,000, Oct., 1899, $15,783.80; that these sums are alleged to have come into the possession of this defendant long prior to any proceedings, civil or criminal, that were begun against the said Greene, the indictment mentioned having been found in December, 1899.

That immediately upon the receipt of such $5,000 and of the sum of $15,783.80, that he turned the same over to Greene or to such person as he directed, without any knowledge of any fraud or intention to defraud the Government or to deprive it of its property or rights.

And the respondent further says that for a long time he was the counsel and personal friend of the aforesaid Benjamin D.

115 Greene; that he had been a man of affairs engaged in the performance of large contracts either as principal or as financial backer, outside of those mentioned in this bill of complaint, and having no connection with the Government, as for instance, contracts for the building of a tunnel under the East River, contracts for the building, in whole or in part, of a railroad in the Adirondack Mountains, State of New York, contracts for building a sewer system in Orange, in the State of New Jersey.

That the respondent knew him to be a man of wealth at the time he first became acquainted with him, which was in or about the year 1892.

That with reference to all the other items mentioned in said Exhibit "F," save and except the Norfolk & Western stock, defendant states and affirms:

That the said Greene, for his own convenience, carried on a speculative account, in the name of defendant, with certain brokers in the city of New York, or elsewhere, and that with the assent of this defendant; and that the securities mentioned therein as having been purchased, were purchased on such specultaive account or sold, and that defendant had never had them nor had any interest in them, does not remember to have had possession of them, and has not them now in his possession, the same having been either bought or sold, as the case may be, without ever having been delivered into the possession of defendant, as he remembers it, but if he did have them, or any of them, he has long before the commencement of this suit turned them over to Greene or his order.

That the small items of dividends collected on account of securities held were moneys received by defendant and paid out or disbursed long prior to the commencement of this suit, and for said Benjamin D. Greene or on his account.

XXVI. This defendant further says, upon information and belief, with reference to the said four hundred shares of the Norfolk & Western stock mentioned in said bill:

That on or about the 14th day of December, 1899, one Benjamin D. Greene was arrested in the city of New York upon a warrant issued by John A. Shields, United States commissioner for the southern district of New York, based on an indictment and complaint charging said Greene and others with conspiracy to defraud the United States of America, and said Greene was required by said commissioner to give bail in the sum of $20,000 for appearance before said commissioner, from time to time as required, for examination before said commissioner, and on said 14th day of December, 1899, said James D. Leary, the plaintiff's intestate, became bail for said Greene on a bond or recognizance in the sum of $20,000.

116 That thereafter, to wit, on the 20th day of February, 1900, the said commissioner found probable cause of guilt of the said Benjamin D. Greene, and committed said Greene to the custody of the United States marshal for the southern district of New York to await a warrant of removal of the said Greene to Georgia from

the judge of the District Court of the United States for the Southern District of New York; that the said marshal thereupon took said Greene into custody, and thereby said $20,000 bail bond became and was cancelled and exonerated.

That thereafter, to wit, on or about the 20th day of February, 1900, the said Benjamin D. Greene entered into a bail bond in the sum of $25,000 for appearance before the said judge, the Hon. Addison Brown, for hearing on application for said warrant of removal and to abide the further order of the said judge, and said Leary became bail for said Greene on said bail bond.

That thereafter, to wit, on or about the 26th day of June, 1900, the said district judge referred the case back to said commissioner and directed the taking of further competent testimony as offered by either party and ordered that the said Greene appear before the said commissioner and attend such further taking of testimony.

That thereafter, to wit, on March 21st, 1901, the said commissioner, having taken such other and further testimony, made his finding of probable cause of guilt of the said Greene and certified the same to the said district judge.

That thereafter, to wit, on or about the 28th day of May, 1901, the said district judge did issue his warrant to the marshal of the United States for the southern district of New York, commanding the said marshal to take into custody and to remove the said Greene to the southern district of Georgia and deliver him to the marshal of that district, and that said marshal took said Greene into custody as so ordered and thereby the said $25,000 bail bond given on February 20th, 1900, by said Greene, with said Leary as bail, became and was exonerated, and all liability thereon ceased and terminated.

That thereafter, to wit, on the 28th day of May, 1901, the said judge enlarged the said Greene upon a bail bond for appearance in Georgia in the sum of $25,000, on which bail bond the said James D. Leary was bail.

That thereafter, to wit, on or about the 8th day of June, 1901, the said James D. Leary, as surety on said last named bond, surrendered up the said Benjamin D. Greene into the custody of the United States marshal for the southern district of New York, and said $25,000 bail bond became and was thereupon cancelled and exonerated.

117 That thereafter said Benjamin D. Greene was admitted to bail in the sum of $40,000 for appearance in Georgia for trial upon said indictment, and thereupon, and on or about January 20th, 1902, a bail bond for $40,000 was given by said Greene, with said Leary as bail, for his appearance at the term of the District Court of the United States for the Eastern Division of the Southern District of Georgia to be holden on the second Tuesday in February, 1902, and from day to day and from term to term should the case be continued.

That at the time of the execution by the said James D. Leary of the bond for $20,000 first above mentioned, viz, on December 14th,

1899, the said Greene placed in the hands of this defendant to secure said Leary against any loss which he might sustain by reason of his becoming surety on said $20,000 bond, three hundred shares of the capital stock of the Delaware, Lackawanna & Western Company with the understanding that at any time he desired he might withdraw the securities so deposited and dispose of them, substituting others in their place. That the securities so deposited were also to be held by the defendant to secure him for the fees and disbursements that might be incurred by him or his firm in defending said Greene or in caring for his interests in any proceedings brought by the United States against him or in any other matters, there being several matters in litigation in which said Greene was interested pending in the defendant's office.

That the defendant thereupon made and delivered to the said James D. Leary a paper writing in the following words, to wit:

"DECEMBER 14TH, 1899.

"JAMES D. LEARY, Esq.

"MY DEAR SIR: Captain Benjamin D. Greene has placed in my hands as indemnity to you for becoming his bondsman in the matter of the United States vs. Greene, Gaynor & others, now pending in the District Court, three hundred shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company. It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligation. I am,

"Yours, truly,

"L. LAFLIN KELLOGG."

That after the said $20,000 bail bond had been exonerated as
118 hereinbefore set forth, to wit, on March 23rd, 1900, on the demand of said Greene, the said Delaware, Lackawanna & Western Railroad Company stock was sold and the proceeds thereof taken from this defendant's custody and control by the said Greene. That other stocks of said Greene which were in this defendant's custody were sold at or about that time, and part of the proceeds thereof were reinvested in 500 shares of Norfolk & Western Railway Company stock. That thereafter said Greene withdrew 100 shares of said Norfolk & Western Railway Company stock, leaving only the certificate for 400 shares of said stock in this defendant's hands.

The defendant further says that he personally is amply responsible financially to meet any judgment that may be recovered by the United States against him for the value of the said 400 shares of Norfolk & Western stock if the Government should sue him and recover such value in an action at law.

XXVII. Moreover, this defendant denies all and singular the allegations and insinuations in the said bill of complaint contained, except alone in so far as the same are herein specifically and expressly admitted.

And having fully answered, he prays to be hence dismissed with his reasonable costs by him about his defense expended.

And he will ever pray, etc., etc.,

L. LAFLIN KELLOGG.

ABRAM J. ROSE,
Solicitor for Respondent.

STATE OF NEW YORK,
Borough of Manhattan, City and County of New York, ss:

I, Luther Laflin Kellogg, whose name is signed to the annexed answer, which is also in the form of an affidavit for use in the said cause, being first duly sworn, do depose and say that the matters and things contained in the foregoing answer (and affidavit), so far as made of my own knowledge, are true, and so far as made upon knowledge or information derived from others, I believe them to be true.

Given under my hand this 3d day of October, 1913.

L. LAFLIN KELLOGG.

Subscribed and sworn to before me this 3d day of October, 1913.

WM. R. HARTPENCE,
Notary Public New York County, No. 213.
New York Register, No. 4225.

119 I have no objection to the filing and allowance of the above as an amended answer of defendant, L. L. Kellogg, it being understood that the allowance of the amendment by the court shall not be cause for delay in setting or trying the case on the merits.

October 3, 1913.

MARION ERWIN,
Special Assistant to Atty.-General,
Complainant's Solicitor.

Endorsed: Amended answer of defendant, Luther Laflin Kellogg.

In the District Court of the United States for the Western District of Virginia. Continued and held at Lynchburg on October 4, 1913.

UNITED STATES OF AMERICA
v.
B. D. GREENE, L. L. KELLOGG, AND INTERVENTION of Mary C. Leary, Admx.

On motion of the complainant, of which notice has been given to the defendants and the intervenor:

It is ordered that this cause be set down for hearing at Lynchburg on October 29, 1913, at 11 o'clock a. m.

Endorsed: Enter: Henry C. McDowell, district judge. Entered Oct. 4, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

In the District Court of the United States for the Western District of Virginia. Continued and held at Lynchburg on November 6, 1913.

UNITED STATES
v.
BENJAMIN D. GREENE ET AL.

This cause came on again this day to be heard, there being present Hon. Marion Erwin, counsel for the Government, Mr. Abram J. Rose, counsel for L. L. Kellogg, and Messrs. Coleman and Strode, counsel for Mrs. Leary, and it appearing that since this cause
120 was argued and submitted on October 29, 1913, some difference of opinion has arisen as to certain facts relative to an amended answer of L. L. Kellogg, which was handed to the clerk of this court and by him endorsed filed on October 4, 1913, and it appearing proper to the court that the exact facts in reference thereto be set out in this order, be it remembered:

That on October 29th, 1913, at the commencement of the hearing of the case counsel for the Government inquired if an order had been made allowing the filing of the said amended answer, and that if it had not he desired that the matter be settled now so that counsel would know on what pleadings the case was being tried. To this enquiry the court, being under a mistake as to the facts, responded that an order had been made allowing the filing of the said amended answer. This statement was made in the presence of counsel for Mrs. Leary, who did not know of the court's mistake of fact, and assumed that the court's statement was correct. And thereupon, under the supposition that such an order had been made, and with the knowledge on the part of counsel for Mrs. Leary that they had never been consulted in reference thereto, had never consented thereto and had never had any notice of the purpose to file the same (although they did know of the fact that the paper was in the clerk's office and had been since October 4, 1913), the hearing of the case was entered upon.

And thereupon the Government announced what papers and exhibits it introduced as evidence to support the case for it, and Mr. Rose announced the papers that he introduced in behalf of Mr. Kellogg, among which was an affidavit made by Luther Laflin Kellogg, verified October 27, 1913, attached to which was a stipulation signed by counsel, dated the same day. Also another stipulation made between counsel for the Government and Mr. Kellogg, which stipulation is dated October 27, 1913, and marked "Stipulation X," which latter stipulation contains copy of letter of December 14, 1899, from L. Laflin Kellogg to James D. Leary.

And thereupon the case was argued by counsel, and in the course of the argument made by Mr. Rose he again adverted to the question of an order allowing the filing of the amended Kellogg answer, and asked the court to endorse at the foot thereof "allowed" and

sign it; and thereupon the court stated that such was not the practice here, but that the filing should be shown by an order entered in the decree book and again, mistakenly, announced to counsel that such an order had been entered, and that if it were found that such order had not been, that such an order would be entered. Thereafter the argument of counsel were closed and the case was submitted to the court, and the court took the case under advisement.

121 After the court had read the pleadings in the case and had discovered the material difference from the standpoint of the intervener between the original Kellogg answer and the amended answer, an examination was made to ascertain if an order had been entered allowing the filing of said amended answer, and it was discovered that no such order had been entered. Thereupon the court advised counsel to such effect and desired to be informed if it would meet with the consent of all parties to enter an order nunc pro tunc allowing the filing of said amended answer as of October 4, 1913. This enquiry met with objection from counsel for Mrs. Leary. And the court upon examination of the evidence in the case having encountered difficulties concerning the meaning of certain exhibits, and having failed to find in the file certain exhibits which were treated in the brief for the Government as being therein, the court by letter invited counsel for the said three parties above mentioned to meet with the court in chambers on November 6th, 1913, and all of the above-mentioned counsel accepted said invitation and came to the judge's chambers on this day.

All of the counsel aforesaid being present, counsel for Mrs. Leary objected to an order being made by the court allowing the filing of the amended Kellogg answer nunc pro tunc, and in support of said argument read to the court copies of letters from Luther Laflin Kellogg to James D. Leary, dated January 19, 1900, May 21, 1901, and June 6, 1901, which copies Hon. Aubrey E. Strode, of counsel for Mrs. Leary, stated he believed to be true copies of the originals which had been seen by him in New York City in May, 1913, and moved the court to reopen the case in order that Mr. Kellogg's testimony might ' heard in full by the court before the case should be decided. An.. in support thereof urged the fact, which is a fact, that at the hearing on October 29, 1913, counsel for Mrs. Leary did not have present with them the file of copies of letters which they now have, and that at the time Mr. Rose, being himself mistaken as to the facts, stated and insisted that the files of Kellogg and Rose showed that there had been no letters from Kellogg to Leary except the letters of December 14, 1899, and the letter of January 19, 1900. And thereupon counsel for Mrs. Leary objecting, the court doth now order and decree that the said amended answer of L. Laflin Kellogg be, nunc pro tunc, filed as of October 4, 1913, to be read only against the United States and not to be read against Mrs. Leary.

And further, counsel for the Government objecting, the court doth now order and decree that this case be re-opened, and that it be set for further hearing at Lynchburg, Va., on November 25th,

122 1913, at ten o'clock a. m., in order that Luther Laflin Kellogg may be orally examined before the court, introduced as a witness for Mrs. Leary.

The Government by counsel excepts to so much of the aforesaid order as re-opens the case and permits Kellogg to testify.

Endorsed: Order, November 6, 1913. Enter: Henry C. McDowell, district judge. Entered November 6th, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

Order reserving objections.

In the District Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA, COMPLAINANTS,
vs.
BENJ. D. GREENE, L. L. KELLOGG, ET AL., defendants; Mary C. Leary, administratrix, intervenor.

Be it remembered that heretofore, to wit, on the 29th day of October, 1913, the above case came on to be heard on the merits, and evidence was offered on the part of the complainants and on the part of the defendant, L. L. Kellogg; among other evidence offered on the part of the defendant, L. L. Kellogg, was his own affidavit, verified on the 27th day of October, 1913, at the bottom of which solicitor of the United States had entered a consent and waiver, subject to the objections reserved therein, as will more fully appear by reference to same, marked "Y," and also a stipulation marked "X" between solicitors for complainant and defendant, Kellogg, admitting in proof copy of a certain letter dated Dec. 14, 1899, from said Kellogg to James D. Leary, as will more fully appear by reference to same. That the solicitor for the intervenor thereupon objected to the reception in evidence of said affidavit and stipulation "Y" on the ground that it was not evidence taken under examination with the right to cross-examination by said intervenor, and incompetent. That thereupon the court informed counsel for said L. L. Kellogg that it would allow said Kellogg to be brought on from New York City, and the trial would be continued from day to day to allow said Kellogg time to come to Lynchburg and to testify as to the matters objected to. That thereupon the solicitor for said Kellogg undertook that he would have Mr. Kellogg come on for that purpose. That thereupon the court suggested that, as Kellogg had not answered the
123 intervention, his testimony could not be heard as against Mrs. Leary, and if not that he could not be cross-examined in behalf of Mrs. Leary. Counsel for Mrs. Leary answered the view that it would be useless to wait for Mr. Kellogg's presence, if they were not to be allowed to cross-examine him, and thereupon the court said it seemed useless to bring Mr. Kellogg, and then counsel for said Kellogg offered said affidavit of said Kellogg, "Y," and stipulation rela-

tive to said copy letter "X" as evidence solely against the United States, and not to be read against the intervenor, and the court thereupon admitted the same as evidence, stating that the same would not be received and read against intervenor but would be received and read against the United States under the terms of the waivers and reservations aforesaid by the United States, and no objection being made to the same being so received, counsel for said Kellogg announced he would not bring Mr. Kellogg on as a witness. And thereupon all the evidence being in, the cause was argued on the merits by counsel for the respective parties and submitted, and the court reserved its opinion and took the cause for deliberation.

That thereafter counsel were called before the court on the 6th day of November, 1913, and certain other proceedings were had, as recited in the order entered on that day by the court, resulting in the provisions of that order opening the case for the purpose of having the defendant, L. L. Kellogg, called as a witness on behalf of the intervenor, as in said order recited, to which order opening the case for such additional testimony the solicitor of the United States excepted.

And now, on the 29th day of November, 1913, the defendant, L. L. Kellogg, being here ready to be called to the stand as a witness, the solicitor for the United States makes the following objections:

1. That the proposed testimony of said Kellogg should not be received, because the time for taking testimony fixed by order of the court within which testimony should be taken by intervenor had long passed prior to the assignment of the cause for trial when it was set for trial for October 29th, 1913, without objection in the presence of counsel for intervenor.

2. That the cause having been fully argued by counsel for all parties and submitted on the evidence on October 29th, 1913, and the position of the United States relative to the effect of the evidence which was in, it is unfair to the complainants to now allow the intervenor to supply new evidence in an attempt to amend the defects of their case, and particularly to endeavor to prove the existence of the oral agreement of understanding set up in
124 said intervention pleaded, but not proved at the time the case was submitted, on October 29th, 1913.

3. That whereas the order entered on November —, 1913, which opened the cause for taking the testimony of said Kellogg, recites that Mr. Rose, counsel for Kellogg, stated in open court at the hearing that he knew of no letters from said Kellogg to said James D. Leary other than the letters of December 14, 1899, and the letter of January 19th, 1900, and recites that Mr. Strode, counsel for said intervenor, did not have in court the copies of the two additional letters in said order referred to, to-wit, May 21, 1901, and June 6, 1901, it yet appears from said recitals that said counsel had actually known of the existence of said letters since some time in May, 1913, and made no effort to offer the originals in evidence or to prove the facts now sought to be proved by said Kellogg, and that said letters

are not newly discovered evidence, and that no sufficient cause is shown to open said cause for the admission of said proposed evidence.

4. That the said defendant Kellogg should not be allowed to give additional testimony in his own behalf, because his depositions already in evidence were long since taken, and the time for taking testimony in his behalf has long since closed, and because it would be unfair to the United States to allow said Kellogg, after the said cause had been so argued and submitted, to alter or add to his testimony already in, particularly in a case in which he is a defendant as well as the proposed witness, and of the character of the present suit.

I certify that the matters above stated preceding the objections enumerated in paragraphs marked 1, 2, 3, 4 above, transpired as therein stated, and that the solicitor for the United States made the objections specified in said paragraphs 1, 2, 3, and 4 above before the witness Kellogg was permitted to testify this day.

In open court. This November 29th, 1913.

HENRY C. McDOWELL, *U. S. Judge.*

Endorsed: Original order reserving objections filed Nov. 29, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg in and for said district on November 29th, 1913.

Honorable Henry C. McDowell, judge.

125 UNITED STATES
v.
BENJAMIN D. GREENE ET AL.

This cause came on this day to be heard, and such proceedings as were had have been reduced to writing and filed as a part of the record of this case, and thereupon the court took the case under advisement.

Endorsed: Order, Nov. 29, 1913. Enter: Henry McDowell. Entered Nov. 29th, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

Proceedings before Judge of U. S. District Court, Western District of Virginia, on November 29, 1913.

In the United States District Court, Western District of Virginia. Continued and held at Lynchburg on November 29, 1913.

UNITED STATES
v.
BENJAMIN D. GREENE ET AL.

This cause came on again this day to be heard in lieu of November 25, 1913, there being present Hon. Marion Erwin, counsel for the United States, Abram J. Rose, Esqr., counsel for L. L. Kellogg,

Messrs. J. T. Coleman and Aubrey E. Strode, counsel for the intervenor, and Luther Laflin Kellogg in person, and thereupon counsel for the Government tendered a certificate to be signed by the court and objections to hearing the testimony of L. L. Kellogg, which was signed by the judge and filed, the same being entitled "Order reserving objections." And thereupon counsel for Mrs. Leary offered in evidence the following four letters written by Mr. Kellogg to James D. Leary: Letter of January 19, 1900, December 14, 1899, May 21, 1901, and June 6, 1901. Mr. Erwin objected to the admissibility of the letters, first, on the ground that the purport on their face is in substance identical with the copies of the originals of the copied letters referred to in the order of the court entered on the 6th day of November, 1913, relative to opening the case, and it appearing that they are letters, if they be original or copies, which were in the possession of the intervenor or counsel ever since May, 1913, and therefore are not new evidence to be offered after the
126 case was closed, no sufficient reason being shown why they were not offered before the case was closed on the hearing on October 29, 1913; and, second, there is no proof of the genuineness of the letters that were sent to the addressee therein named at the time they were stated to have been sent. I also object to the letters of May 21, 1901, and June 6, 1901, because of their irrelevancy and immateriality, it appearing that there are no pleadings in the case which would justify their admission. There being this difference between those two letters and the letter of December 14, 1899, that the intervenor pleads, at least her construction of the letter of December 14, 1899, which she claims was in substance to control the going on the bond by Leary of January, 1902, and merely for the purpose of setting out the contract the letter of December 14, 1899, might be admissible to explain the terms of her alleged contract of January, 1902, but it is not otherwise relevant. The letters of May 21, 1901 and June 6, 1901, not having been pleaded and not relating to the $40,000 bond of January, 1902, are incompetent and irrelevant.

By the COURT. Mr. Coleman, can you avow that you can and will now and here prove the authenticity of the letters offered?

A. If your honor please, I might as well make an explanation to you now as at any other time, an explanation which I regret to have to make to you. At the last meeting of counsel before you, as this order shows, this case was opened for the purpose of allowing Mrs. Leary to introduce Mr. Kellogg as a witness in her behalf. In view of Mr. Kellogg's answer in this cause we had every right to presume that his testimony would be in accord with his original sworn answer filed by him in this cause. We expected to have an interview with him, and when Mr. Rose and Mr. Strode separated on the day that counsel met here last it was with the expectation that we were to have an interview with Mr. Kellogg in order to know the facts that could be proved by him or that he might be able to testify to. That interview we did not get. The first intimation that we

had that these gentlemen were in town was when we were notified of their attendance in open court. In a hasty interview of a few moments with Mr. Kellogg we find that we are given to understand that his testimony, if he is introduced as a witness in this cause, will be on a point that is exceedingly material to Mrs. Leary, in the teeth of his sworn answer and under the circumstances we do not feel justified in introducing a witness otherwise incompetent and allowing him opportunity to undertake to disprove his answer. Under these circumstances, as much as we regret it, and we offer apologies to the court and counsel for the delay which has been occasioned, we cannot introduce Mr. Kellogg.

127 Additional objection of Mr. Erwin to the introduction of the letters: In order to make these letters admissible not only must the original signature of the writer be proved, but it must be shown that the letters came from the proper custody and other circumstances to show they are free from suspicion of having been written after the conversation arose, and it is not sufficient to simply show that certain papers offered in evidence or any handwriting are the best evidence obtainable, and in this case these letters are not letters coming from the opposite party to the alleged agreement sought to be proved, but it is offered against a third party, the United States, who has nothing to do with the letters or their transmission and no party to the letters.

Objection by Mr. Rose in behalf of L. L. Kellogg:

When I was here on November 13th it was arranged between Mr. Strode and myself that he could have an interview with Mr. Kellogg when he reached here. We expected to reach here on the evening of the 24th or morning of the 25th. I wrote Mr. Strode that we would be at the Virginian on the evening of the 25th, and Mr. Kellogg would be glad to see him, or if the train was late and he could not have an interview that evening that he could see him the next morning. The engagements of counsel prevented us from coming that day and the matter was adjourned until the 29th. Yesterday afternoon at about 4.30 I telegraphed Mr. Strode from Washington that Mr. Kellogg and myself would arrive in Lynchburg on the train due on the 29th about 9.10. We arrived about 9.30 and waited there until after ten o'clock, and then came to the court house, where Mr. Kellogg did have an interview with Mr. Strode and Mr. Coleman in the chambers of the judge. Inasmuch as this case was opened by the court at the request of counsel for Mrs. Leary, the intervenor, and upon their request and for the sole purpose of calling Mr. Kellogg as a witness in their behalf and upon the suggestion of the court that Mr. Kellogg should be produced in open court rather than that his deposition be taken, and upon the promise of counsel for L. L. Kellogg to produce him in court as a witness to be called by the intervenor, and he now being here pursuant to the request of counsel for Mrs. Leary and the order of the court, and tendering himself as a witness to them, I now object to

these letters being received except as part of his examination or in connection therewith.

By the COURT. Under the act of February 26, 1913 (37 Stats., p. 683), genuineness of handwriting may be proven by compari-
128 son by the court between an admitted genuine and the offered signatures. The genuineness of the letters of December 14, 1899, and of January 19, 1900, are satisfactorily proven by stipulations and exhibits heretofore filed in this cause. A comparison of the letters of May 21, 1901, and of June 6, 1901, with the above mentioned two letters satisfies me of the authenticity of the signatures thereto, and subject only to evidence of behalf of Mrs. Leary showing the custody from which said letters came the objections of the Government and the objections of Kellogg to the admissibility of said letters are overruled. To which ruling the Government excepts.

Aubrey E. Strode, having been duly sworn, testified as follows:

The four original letters now offered and referred to were first seen by me in the office of Messrs. McClure & McClure, in New York City, in May of the present year, when they were exhibited to me as being letters that they purport on their face to be by Mr. McClure, one of the members of that firm, with whom I had been dealing, since the beginning of this intervention litigation, as counsel for Mrs. Leary, and also in the presence of Lehmaier & Pellet, attorneys of New York City, who since the death of Mr. David McClure, the senior member of McClure & McClure, have been representing Mrs. Leary in this litigation, and also in the presence of a gentleman by the name of Leary, whose initials I do not recall, who was introduced to me as the son of Jas. D. Leary, dec'd, and of Mrs. Mary Leary, the intervenor. After the last hearing in this case I wrote Messrs. Lehmaire & Pellet, requesting them to send me these four letters, original letters, which I had seen under the circumstances stated. And a few days ago I received a letter from Messrs. Lehmaier & Pellett, by registered mail from New York City, enclosing these four letters, which I have produced here today.

Cross-examination by Mr. ERWIN:

I desire, may it please your honor, to present my objections to the testimony of Mr. Strode, generally on the same general grounds that I objected to the admission of the testimony of Mr. Kellogg in the exceptions which I took at the opening of the case, namely, that it comes too late, after the case was formally closed. I understand I was overruled on that point. Am I correct?

The COURT. Yes, sir.

Now I will ask Mr. Strode some questions.

Q. Mr. Stode, you went on to New York City in May for the
129 purpose of arranging to take testimony after the entry of the mandate from the Supreme Court in this case, did you not?

A. Yes, sir.

Q. That was your purpose there?

A. Yes, sir.

Q. And you read all four of these letters at that time?

A. Yes, sir.

Q. And you knew of the existence of these letters when the case was set for trial on October 29, 1913?

A. I did, but in this connection I will state that I was also shown at that time a later letter either signed by Mr. Rose——

Mr. ERWIN. Now, I am going to object to your testifying to any letters from Mr. Rose because you referred to that letter before at a former hearing as a letter being written after this suit was filed.

Mr. STRODE. I was shown a subsequent letter; that is, subsequent to the four letters referred to, written from the office of Messrs. Kellogg and Rose, indicating on its face apparently that it had been dictated by Mr. Rose which in substance insisted that there had never been any agreement or any reference in effect to any indemnity to Mr. Leary upon any of the various bail bonds that Mr. Leary had gone on for Mr. Greene, except as was contained in the letter of December 14, 1899. That is the explanation I want to make. I will add, subject to objection, that until the day on which the order was entered reopening this case for testimony on November 6, 1913, was I, or so far as my information is, other counsel representing Mrs. Leary, able to get from Mr. Rose or Mr. Kellogg anything except a denial that there were any other letters than those of December 14, 1897, and January 9, 1900.

Cross-examination by Mr. ROSE:

Q. Mr. Strode, when did you first see Mr. Kellogg?

A. This morning.

Q. Did you ever show to him or to me prior to Nov. 6, 1913, the original letters that are now offered in evidence of June and May, 1901?

A. I cannot recall that I did. My recollection being that I made reference to there being some other letters, which met with your positive denial that there were no such letters, and I did not have either the originals or copies before me.

Q. As I understand it, you never showed the originals or the copies to Mr. Kellogg at all?

A. No; I never did. I never had an opportunity before.

130 Q. And you never showed the originals or copies to me until November 6, 1913?

A. I did not. By way of explanation there, I will say that my information was that this matter had been up with your office, either with you or Mr. Kellogg, in New York City, and for that reason I did not regard it as encumbent upon me personally to do so, as I had been shown your letter in which you denied there were such letters.

Q. Have you that letter of mine?

A. I think I have a copy of it, either here or in the files of my office.

Q. May I see it?

A. Certainly, sir.

Q. Who was that letter written to, do you remember?

A. I think it was written to some member of the Leary family or possibly to Messrs. McClure & McClure.

Q. Do you know whether any reply was made?

A. I do not.

Q. Did you ever write to Mr. Kellogg saying you had other letters than the one of December 14, 1899, and the one of January 19th?

A. I did not, personally My recollection is that the file of correspondence I was shown showed that letter was written from your office just after the final judgment had gone against the Leary estate on the bail bond in New York City in 1908 and the conclusion I reached was——

Mr. ROSE. No conclusions, please.

Mr. STRODE. I state it subject to objection. I think it will appear from comparison of the dates of the correspondence that it was because of the position then taken by your office—that is, Messrs. Kellogg and Rose—which was acted upon as the final position that you would take in the matter that Mrs. Leary felt it necessary to file her intervention in this suit, which she did very shortly after.

Mr. Rose moves to strike the above answer as not responsive to the question.

Motion overruled.

Exception taken.

Q. Although you knew that the letter of Mr. Rose that you say was written about 1908 was a mistake in so far as it stated that there were no other letters than that of December 14, 1899, and although other counsel for Mrs. Leary knew that, no effect was made to correct that mistake by sending copies of those letters to Mr. Rose or Mr. Kellogg?

131 A. My recollection is, subject to the production of the letter—copy of the letter, which I hope to get—that the letter did not indicate a correspondence with reference to specific letters, but was, in effect, a reply to a request from some of the parties in interest for the production of the securities that they were entitled to, and contained, in substance, that there had never been any agreement, except that with reference to the $25,000 bond.

Q. In October 29, 1913, when this case was on trial before the United States District Court in Virginia, you were present?

A. Yes, sir; I was present.

Q. Mr. Rose was present?

A. Yes, sir.

Q. You heard Mr. Rose make a statement to the court that there were no other letters that he could find than the letter of December 14, 1899, and January 19, 1900?

A. Yes, sir.

Q. At that time you had seen the two letters of May 21, 1901, and June 6, 1901?

A. Yes, sir.

Q. Did you have copies of them with you then?

A. I did not. I had the copies at the office.

Q. Did you send for those copies and show them to the court or Mr. Rose?

A. I did not at that time, because your statement, Mr. Rose, denying that there were any such letters was made with such apparent positiveness and marked vehemence and heat that I thought that I owed it to you to make sure of the ground on which I stood before again adverting to the subject. At the next opportunity thereafter, when next before the judge, I brought the copies that I had and brought them to the attention of the court and yourself. That was about a week or ten days after we were here in court.

Q. And although you had those copies you did not show them to me when we were here on October 29? Nor after that time until November 6th?

A. For the reasons stated I did not, and in the meantime I had not seen you.

Q. When we left here on October 29th there was no expectation that I should come back here, was there?

A. When we left the judge's chamber, where the hearing
132 had been had, there had been up to that time no introduction into this record of any of those letters. Later that day or possibly the next morning I discovered in the clerk's office what purported to be the amended answer—I am mistaken about that. On October 29th was the first time that we had been before the court with the amended answer of Mr. Kellogg under consideration by the court and all of counsel. It is true that I had seen this amended answer in the clerk's office sometime previous thereto, during the month of October, but had not had up with the court our objections to the filing of that answer, and one of those objections was then suggested, that if the amended answer were put in we thought all of the letters should be included, and you denied that there were any other letters except the letter of January, 1900, and at the first opportunity after the hearing on November 6th, after I had access to my files, I brought them and presented them to the court.

Q. On October 29th there was presented and filed, was there not, a stipulation marked "X"?

A. Yes, sir.

Q. That was done in your hearing?

A. Yes, sir.

Q. That is the stipulation that sets out at length the letter of December 14, 1899, is it not?

A. Yes, sir. And that was the first time it had been attempted to introduce in evidence that letter though you had previously introduced the amended answer, filed on October 4th.

Q. On that day you had in your office copies of those letters of May 21, 1901, and June 6, 1901?

A. My impression, Mr. Rose, as I then stated to you, was that I had such letters in my office, but your denial was so insistent and vehement that I abated my impression until I could personally examine the file and produce them.

Q. We took an adjournment for the noon hour, did we not?

A. I think we did.

Q. Did you go to your office?

A. Just for a moment or two, and then went to lunch.

Q. Did you bring those letters back with you?

A. I did not examine our files for them.

Q. Did you tell me in the presence of the court that you had copies of other letters in your files purporting to come from Mr. Kellogg?

A. Mr. Coleman stated to you in my presence on that day that there were other such other letters and you again repeated your denial.

133 Q. Why didn't you show me the copies to show that I was mistaken?

A. I did on November 6th, which was the first fair opportunity, as I saw it, that I had.

Q. When I left on October 29th was there any expectation that I was to come back here for a further hearing in this case?

A. Not that I recall.

Q. When you went back to your office on the 29th, or thereafter, did you send me copies of those letters?

A. No. Because it just happened, as I recall it, that on the same day that I found opportunity to go through our files, this particular file not being in my office but in Mr. Coleman's office, I had from Judge McDowell information that questions had arisen in the record that would make it necessary to recall counsel here. It was the same letter sent to all counsel. And I thought it the easiest way to get the matter before the court and counsel was to bring it up at that time.

Q. You say that those copies were not in your personal files. In whose files were they?

A. They were in the files of Messrs. Coleman, Easley & Coleman, with whom I am associated in this litigation.

Q. Mr. Coleman was present, was he not, when I made the statement that the only letter was the letter of December 14, 1899, and that there were no other letters in relation to the matter to my knowledge that I could find?

A. I think Mr. Coleman was present.

Q. And you had seen those copies of the May and June letters in Mr. Coleman's office prior to that time and in Mr. Coleman's presence, had you not?

A. I can not say positively about Mr. Coleman's presence. I think Mr. Coleman had known that there was some correspondence, of which he had copies, between Mr. Kellogg and Mr. Leary, but he had turned over to me very largely the immediate dealing with that matter.

Re-direct examination:

Mr. COLEMAN: Q. Mr. Strode, I now have found in our files what purports to be a copy of a letter of January 13, 1908, from Messrs. Kellogg & Rose to Mr. Daniel J. Leary, one of the sons of Mr. Jas. D. Leary and of the intervenor——

Mr. ERWIN. I want to object right here if he wants to put in that letter. I will object to it on the ground, first, that it is as on
134 its face and as stated by the date a letter from Mr. Kellogg to Mr. Leary long after this suit was filed and after testimony had been taken. That it is inter parties between Kellogg and the intervenor, whose interest are opposed to the United States, and introduced long after the testimony had been closed, and for that reason incompetent; and, second, that the letter is only a copy and not proven to be the original, and it is incompetent and irrelevant and should not be allowed to go to the record. It has been stated to the court that there is a suit now pending between the intervenor, Leary, and Mr. Kellogg in the State court in New York, and all this testimony may be very pertinent to the issue between those two people in that suit, but certainly cannot be admitted in this case to prove their claim against the Government or otherwise, or the claim of Kellogg to this stock or the claim of Leary to this stock, and that is the only controversy here. The court has eliminated any personal claim against Leary.

Mr. COLEMAN. We do not insist that this letter is admissible as against the Government, but Mr. Rose in his examination of Mr. Strode called for the letter and we just want to say it is here. We have submitted it to Mr. Rose and if Mr. Rose——

By the COURT. There is no issue in the case between Mrs. Leary and Mr. Kellogg. The objection of the Government is sustained. The four letters offered by Mrs. Leary are admitted in evidence. Has counsel for Mrs. Leary any more evidence to offer?

Mr. COLEMAN. We have none.

Mr. ROSE. Mr. Kellogg is here at the court's request and I wish that he be sworn as a witness in this case.

Mr. ERWIN. For whom?

Mr. ROSE. For himself or for the information of the court.

Mr. ERWIN. I object again to the admissibility of any testimony from Mr. Kellogg at this time on all the reasons and grounds that I have stated in the exceptions already entered by the court this morning and on the additional ground that the court in its order opening the case in so many words opened it only for the calling of Mr. Kellogg as a witness on behalf of the intervenor, and it is unfair to the Government, the opening of the case being for a limited purpose, to have Mr. Kellogg called as a witness generally in behalf of himself at this stage of the case.

Mr. COLEMAN. Mrs. Leary's counsel feel constrained to object to any testimony of Mr. Kellogg as against her, upon the ground that

there is no issue between Mrs. Leary and Mr. Kellogg in this case, he having declined to file answer to her bill of intervention and Mr. Leary being dead.

135 The COURT. The objections of the Government and of Mrs. Leary to the testimony are sustained.

Mr. Kellogg personally asked permission to make a statement to the court, stating that he had been put in a false position in regard to the letters herein mentioned and that he felt it due himself that he be permitted to explain the facts. But the court being of opinion that such explanation can not be properly incorporated on the record, denied the request.

Mr. KELLOGG. I also ask the right of a witness and according to these proceedings as against the Government, that I be permitted to explain not only in regard to the letters but to testify to other facts, particularly as to the contents of the original answer, for it sets out that the agreement was extended to the other $40,000 bond. I desire to state in that connection——

Mr. COLEMAN. I object to your statement.

The COURT. I do not think I should hear it.

Endorsed: Proceedings referred to in order of Nov. 29, 1913. Henry C. McDowell, district judge. Filed Nov. 29, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

[Law office of Kellogg, Rose & Smith, Equitable Building, 120 Broadway. L. Laflin Kellogg, Abram J. Rose, Arthur H. Smith, Alfred C. Pette, Philip M. Brett.]

NEW YORK, *Jan. 19, 1900.*

JAMES D. LEARY, Esq.,
Hoffman House, New York City.

MY DEAR MR. LEARY: I herewith send you the letter which you were entitled to have in regard to your qualification as bondsman for Captain Greene. I was waiting for you to call for it.

As you see, I wrote the letter the very day that I received the stock.

Yours, very truly,

L. LAFLIN KELLOGG.

Encl.

136 [Law office of Kellogg, Rose & Smith, Equitable Building, 120 Broadway.]

NEW YORK, *Dec. 14, 1899.*

JAMES D. LEARY, Esq.

MY DEAR SIR: Captain Benjamin D. Greene has placed in my hands, as indemnity to you for becoming his bondsman in the matter of the United States against Greene, Gaynor, and others now pending in the district court, three hundred shares of the capital stock of the Delaware, Lackawana & Western Railroad Company.

It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligation. I am,

Yours, truly,

L. LAFLIN KELLOGG.

[Kellogg & Rose, attorneys & counsellors at law, Equitable Building, 120 Broadway, New York.]

NEW YORK, *May 21st, 1901.*

JAMES D. LEARY, Esq.,
17 State Street, New York City.

MY DEAR MR. LEARY: It will be necessary to renew the bail given by you for Capt. Greene, and for which I hold the security for your protection, on Thursday morning next at 10.30.

Will you kindly come to this office for that purpose about 10.15. I am very sorry to trouble you, but it can not be helped. This new bond is to take the place of the old one without additional liab lity.

Yours, truly,

L. LAFLIN KELLOGG.

Call up Mr. Kellogg.

[Kellogg & Rose, attorneys & counsellors at law, Equitable Building, 120 Broadway, New York.]

NEW YORK, *June 6th, 1901.*

JAMES D. LEARY, Esq.,
17 State Street, New York City.

MY DEAR MR. LEARY: I am obliged to trouble you again to
137 renew the bond in the Greene and Gaynor matter. I will have to trouble you to be in court between ten and half past ten Saturday morning.

The reason for the matter is not that you have to incur any additional liability, but simply to enable them to carry their case to the United States Supreme Court.

All the parties and all the other bondsmen will be on hand before Judge Lacombe by a special arrangement (as the judge is going away) on Saturday morning at half past ten.

Please let me hear from you today, as the matter is most important.

With kindest regards, and hoping that you did not suffer from your misstep in the office, I am,

Yours, very truly,

L. LAFLIN KELLOGG.

These letters are fastened together and endorsed: Original letters filed in behalf of Mrs. Leary on November 29, 1913. Filed November 29th, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

Stipulation "X."

District Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA, PLAINTIFF,
against
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and Norfolk & Western Railway Company, defendants.

It is hereby stipulated between the United States and the defendant Luther Laflin Kellogg, evidenced by the signatures of their respective solicitors undersigned, in the above stated cause, as follows:

That on the trial of this action the following copy of a letter written by said Luther Laflin Kellogg to James D. Leary may be offered in evidence by the defendant Kellogg with the same force and effect as if the original of said letter had been produced and offered in evidence, the United States waiving the production of the original and the United States admitting that such original was written to said Leary on December 14th, 1899, and delivered to said Leary by said Kellogg on or about January 19th, 1900:

138 "DECEMBER 14TH, 1899.

"JAMES D. LEARY, Esq.

"MY DEAR SIR: Benjamin D. Greene has placed in my hands as indemnity to you for becoming his bondsman in the matter of the United States against Greene, Gaynor, and others, now pending in the district court, three hundred shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company. It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligations. I am,

"Yours, truly,

"L. LAFLIN KELLOGG."

The United States reserves and makes objection to the admissibility of said letter, whether to the original or copy, that it is irrelevant, incompetent, and immaterial to the issues in the present above-stated suit.

It is further stipulated that said letter was written at the time of the execution by said Leary of the bail bond for $20,000, executed on December 14th, 1899, which was subsequently, and on or about February 20th, 1900, cancelled and exonerated.

Dated October 27th, 1913.

MARION ERWIN,
Special Asst. to Atty. Genl., Compl's. Solr.
KELLOGG & ROSE,
Solicitors for Deft. Kellogg.

Endorsed: Stipulation "X." Filed Oct. 29, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

Stipulation "Y."

District Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA, PLAINTIFF,
against
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and Norfolk & Western Railway Company, defendants.

It is hereby stipulated between the parties evidenced by the signatures of their respective solicitors undersigned, in the above-stated cause, as follows:

139 That the annexed affidavit of L. Laflin Kellogg may be offered in evidence on the trial of this case with the same force and effect as if the testimony contained therein had been given in open court or before an examiner pursuant to notice.

The Government reserving and making the objection to the admissibility of said proposed testimony that it is irrelevant, immaterial, and incompetent, and not being understood as admitting the facts alleged in said affidavit. But waives any objection as to the time of taking the said affidavit.

Dated, October 27th, 1913.

MARION ERWIN,
Special Asst. to Atty. Genl., Compl's. Solr.
KELLOGG & ROSE,
Solicitors for Deft. Kellogg.

District Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA, PLAINTIFF,
against
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and Norfolk & Western Railway Company, defendants.

CITY AND COUNTY OF NEW YORK, *ss:*

Luther Laflin Kellogg, being duly sworn, says that he is a member of the firm of Kellogg & Rose, attorneys and counsellors at law of the State of New York, said firm being the successor of the firm of Kellogg, Rose & Smith, of which firm deponent also was a member.

That deponent first became acquainted with Benjamin D. Greene in the spring of 1893, when deponent's said firm represented him and other parties interested with him in litigation against the East River Gas Company of Long Island City, pending in the United States Circuit Court for the Southern District of New York. That said action was brought by McLaughlin and Reilly against the East River Gas

Company for damages for breach of a contract upon which Benjamin D. Greene was one of the indemnitors of the sureties under the contract. That in said action deponent was counsel for the plaintiffs, and indirectly for said Greene, who was financially interested in the result of said action. That said proceeding involved matters of large importance.

That in November, 1893, deponent also represented said Greene in another suit pending in the United Staten Court, in
140 which deponent's said firm of Kellogg, Rose & Smith were the attorneys of record for said Greene, brought by the Sigua Iron Company to recover on an alleged stock subscription, and involving a large amount of money.

That by reason of deponent representing said Greene in the matters referred to deponent knew him to be a man of standing and importance in the business world and possessed of considerable means.

That at the time of the institution of the proceedings by the United States against said Greene, based on the alleged fraudulent transactions referred to in the bill herein, viz, in December, 1899, and on December 14th, 1899, when there was deposited with him certain securities, deponent had no knowledge of the sources from which said securities were acquired, other than the fact that they were turned over to deponent by said Greene as the owner thereof. That said securities were received by deponent in absolute good faith and without suspicion or notice of any flaw or taint in their title, or of any fraud in their acquisition, or of any adverse claim whatsoever.

That in the proceedings instituted by the United States, deponent did not personally represent said Greene as counsel, nor did he represent those claimed to have been associated with him in the fraudulent acquisition of moneys from the Government, but in said proceedings said Greene and those associated with him were represented by deponent's partner, Mr. Abram J. Rose, and deponent had no personal knowledge of the facts disclosed by said proceedings and took no part therein, except on one occasion, when he took part in the examination of one Robert F. Westcott, a witness examined therein, which examination took place on or about August 10th, 1900.

That at the time of the receipt of said securities and during the pendency of the proceedings instituted by the United States, said Greene denied he had been in any way guilty of any fraud in connection with the matters referred to in the complaint, and deponent so believed and now believes.

That the securities described in the paper writing dated December 14th, 1899, in form of a letter addressed by deponent to James D. Leary, copied into deponent's amended answer filed in this cause on October 14th, 1913, to wit, 300 shares of Delaware, Lackawanna & Western Railroad Company stock, were left with deponent by said B. D. Greene at that time for the purpose in said letter stated, and also to secure deponent and his firm for the fees and disbursements that might be incurred by deponent in defending said Greene or in

caring for his interests in any proceedings brought by the United States against said Greene, or in any other matters, there
141 being several matters in litigation in which said Greene was interested pending in deponent's office. And that as deponent is informed & believes the said defendant Benjamin D. Greene, was taken into custody of the United States marshal before the said John A. Shields, commissioner, on February 20th, 1900, on an order of commitment to await a warrant of removal to Georgia on the charge for which said temporary bail bond given December 14th, 1899, had been given, and said temporary bail bond of December 14th, 1899, for appearance before the commissioner became and was, on said February 20th, 1899, fully exonerated, and all obligation of said James D. Leary on said bail bond referred to in said letter of December 14th, 1899, was then ended and terminated.

L. LAFLIN KELLOGG.

Sworn to before me this 27th day of October, 1913.

[NOTARIAL SEAL.] WM. K. HARTPENCE,
Notary Public, New York Co.

Endorsed: Stipulation & affidavit. "Y." Filed Oct. 29, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

In the District Court of the United States for the Western District of Virginia, at Lynchburg.

UNITED STATES OF AMERICA
vs.
B. D. GREENE, L. LAFLIN KELLOGG, ET AL. } In Equity.

Testimony.

Depositions taken in New York City on December 21, 1905.

The defendant, L. Laflin Kellogg, as a witness for himself, testified:

Resides in the city of New York; is a lawyer; 56 years of age; knows Capt. B. D. Greene; prior to September 10, 1903, was his counsel and one of the firm of Kellogg and Rose, his lawyers; had also to do with certain private and personal business for him in regard to the sale of stocks that he sent to witness, and in regard to the establishment of the account of Franklin Nevius with the brokers, Haven & Clement. Before September 10, 1903, an
142 account in the name of witness was kept with A. W. Kilborne & Co. Just prior to September 10, 1903, witness was directed by Capt. Greene to close out all his interests that witness had in witness's account which witness had for Greene in witness's account, and also in the Franklin Nevius account. This witness did, and as a result of the sale of the Greene securities and closing out the accounts there came into the hands of witness the amount of

$19,847.74, of which amount, on September 10, 1903, witness drew $19,800 in cash and turned it over to a man by the name of Fiero, to whom witness was directed by Capt. Greene to turn over the money, as he would take it to him where he was then at Quebec. Witness had before seen Fiero, who was a friend of Greene's, that came and got the currency from witness. Of the $19,800.00, $8,400.00 was in the Kilborne account and the balance in the other; and this $11,447.47 that was in the Haven & Clement account was made up in part of the sale of the one hundred shares of Norfolk & Western stock, as the witness understands, it having been so reported to Nevius by Haven & Clement, and by him to witness. Witness has not a dollar of money in his personal account belonging to Greene.

On cross-examination by Mr. Erwin, counsel for complainant, witness testified that he had as evidence of the payment of said sum of $19,800.00 a check dated September 10, 1903, which witness produced, drawn on the New York Security & Trust Co., signed L. Laflin Kellogg, and payable to the order of currency. Stamped New York Security, Sept. 10, 1903. Cashed. Trust Company. That was the check on which witness drew the money. Witness produced the receipt showing the delivery of that money to Mr. Fiero, a New York man, a broker whom witness had known for some time prior, as he came in with letters from Capt. Greene, as Fiero was in the habit, as witness thought, of going and bringing messages from Capt. Greene; and as witness recollected, witness paid the money over to Fiero on Greene's order, the whereabouts of which order witness did not know, but witness has a receipt from Fiero. Of the balance in the Nevius account, stated to be $11,447.46, $47.46 is not accounted for by the check; so that would be $11,400.00 from the Nevius account, and $8,400.00 from the other, A. W. Kilborne & Co. account, which was received on the same day, September 10, 1903; and the $19,800.00 witness gave over to Fiero, September 10, 1903; and afterwards, on September 30, 1903, Fiero brought $10,000.00 in cash to witness, which witness sent to Greene. Witness does not know what this $10,000.00 had to do with the $19,800.00.

This $10,000.00 witness sent by express to Greene, and thought
143 he could find the express receipt for it. Mr. Nevius is connected with the business of Kellogg & Rose, and this account was put in his name so as to distinguish it entirely from any transaction that witness had at that time with Haven & Clement. Witness was carrying an account there and didn't want to get it mixed up with witness's account. This account was established in the name of Franklin Nevius for Greene, and the whole is Greene's and is no one else's.

In this Nevius account, which was closed by that payment of $11,447.46, it appeared that there was a sale for the account of Capt. Greene, 100 shares of Norfolk & Western stock, three hundred of Southern Railway preferred stock, two hundred shares of Erie stock,

and 100 shares of the account referred to, it looks like Pres. Car, the sales of all which stock would look to amount to a much larger sum of money than resulted in $11,447.46, as to which the witness explained that this was a speculative account and the stocks which were deposited there were simply deposited as a margin for the broker's security, as it was necessary to keep margins to cover and satisfy the brokers. If these shares were shares of Capt. Greene they were lost in the account. They were used as margin. That was all there was in the account. There were no other payments of money to witness or to Nevius that witness knows of. If there were any they were handed over to Greene without any deduction, and witness hasn't any receipts for any such stocks delivered to Capt. Greene. Witness has not the express receipt for the $10,000 sent by witness to Capt. Greene. The Fiero referred to is Raymond H. Fiero.

The defendant Kellogg's witness, Franklin Nevius, testified he resided in Jersey City, N. J.; age 27; lawyer, connected with the firm of Kellogg and Rose for eight years; knows Capt. B. D. Greene; has met Raymond H. Fiero several times. On or about the 30th day of September, 1903, met Fiero in Mr. Kellogg's office. Fiero delivered to Mr. Kellogg $10,000.00 in two five thousand dollar bills, stating that he had been requested by Capt. Greene to send it to him care of a man named Phillips. Witness and Fiero went to the express office where the money was put in an envelope, sewed up, and sent to Phillips at the Chateau Frontenac, Quebec. Witness is the Franklin Nevius whose account was kept with Haven & Clement at the request of Mr. Kellogg, and there is no money or stock of any kind belonging to Capt. Greene now in the possession, custody, or control of witness, and there has not been since September 30, 1903. The impression of witness is that the express receipt of the express company for the package was taken by Mr. Fiero; but it would not show the amount of money in any event. Witness identified a
144 duplicate of the receipt he gave to Fiero, and the writing on the bottom thereof in the handwriting of the witness made at or about the date at the top of the receipt, correctly stating what was done, the following words: "Forwarded by American Express, September 30, 1903, to J. H. Phillips, Chateau Frontenac, Quebec."

On cross examination by Mr. Erwin, witness stated that the first time he had known Fiero was when he met him at Mr. Kellogg's office at or about the date of that receipt, and he had seen him perhaps half a dozen times since, and witness thinks Fiero's place of business is at No. 25 Broadway.

At the end of the foregoing two depositions the following is appended:

"It is agreed by and between the solicitors for the respective parties that the following is a copy of the receipt given by Franklin Nevius to Raymond H. Fiero, on or about September 30, 1903, hereinbefore referred to.

["Britton & Fiero, members N. Y. Stock Exchange; stocks, bonds, and investment securities. 25 Broad St. & 50 Exchange Pl., New York. Charles P. Britton, Raymond H. Fiero, members N. Y. Stock Exchange.]

"SEPTEMBER 30, 1903.

"Received from Raymond H. Fiero, ten thousand dollars ($10,000.00) in cash, being part of the sum of $19,800.00 in cash that he received from me as mentioned in his receipt heretofore given me.

"FRANKLIN NEVIUS.

"Forwarded by American Express, Sept. 30, 1903, to J. H. Phillips, Chateau Frontenac, Quebec."

Stipulation.

It is stipulated between the undesigned that for the purpose of the appeal of the intervenor, Mary C. Leary, administratrix, or of the appeal of the defendant, L. L. Kellogg, the foregoing is a fair reduction of the depositions of the said L. L. Kellogg and Franklin Nevius, taken in New York County and city before Thomas A. Healy, notary public in and for the county of New York, on December 21–23,
145 1905, and read in evidence on the part of the defendant Kellogg on Oct. 29, 1913, and that the same may be copied into the transcript on any appeal from the decree of Dec. 13, 1913, in lieu of the said original depositions.

MARCH 27, 1914.

J. T. COLEMAN and
AUBREY E. STRODE,
Solicitors for Mary C. Leary, Admx., Appellant.
MARION ERWIN,
Special Asst. to Atty. Genl.
ABRAM J. ROSE,
Solicitor for Luther Laflin Kellogg.

Endorsed: Filed April 8th, 1914. Stanley W. Martin, clerk.

Stipulation No. 1

(Dated Dec. 21, 1905.)

Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA
against
BENJAMIN D. GREENE ET AL.

It is stipulated between the parties, evidenced by the signature of their respective solicitors undersigned, in the above stated cause as to certain items set forth in Exhibit "F" to complainant's bill, as follows:

First. October 12, 1898. Item of check of Lee Livingston & Company, drawn on the Corn Exchange Bank, New York, No. 19264,

dated October 12th, 1898, payable to the order of B. D. Greene, $5,000.

Stipulation: That said check represented certain moneys of B. D. Greene paid over to L. L. Kellogg for account of said Greene, and that on October 22nd, 1898 the said L. L. Kellogg, by the direction of B. D. Greene, disbursed said money by his check in favor of R. G. Ross for $5,000, drawn on the New York Security & Trust Company. That the complainant makes no claim in this action of liability against said Kellogg for the receipt and disbursement as aforesaid of $5,000.

146 Second. Item, October, 1899. Check of Lee Livingston & Company drawn on the Corn Exchange Bank, New York, No. 24194, dated October 4th, 1899, payable to the order of B. D. Greene, $15,783.80.

Stipulation: That said check belonged to B. D. Greene and was endorsed by L. L. Kellogg for the purpose of identifying the signature of B. D. Greene with August Belmont & Company, and that the proceeds of the check never came into the possession of L. L. Kellogg, as shown by his books and accounts; that the complainant makes no claim in this action against said Kellogg for his connection with this transaction.

Third. Item March 23rd, 1900. Sale by A. W. Kilbourne & Company, in account kept in the name of L. L. Kellogg, of 400 shares of Delaware, Lackawanna & Western Railroad Company stock, $35,791.50.

Item March 23rd, 1900. Sale of A. W. Kilbourne & Company, in account kept in the name of L. L. Kellogg, of 600 shares of the Canada Southern Railway Co. stock, $29,724.50.

Item March 26, 1900. Sale by W. A. Kilbourne & Company, in account kept in the name of L. L. Kellogg, of 100 shares Canada Southern Railway Company stock, $4,958.25.

These three items aggregate $70,474.25.

Stipulation: That the proceeds of said securities so sold were used by A. W. Kilbourne & Company, as far as said proceeds went, in the purchase, in account kept in the name of L. L. Kellogg, of the following securities shown in Exhibit "F": March 23, 1900, purchase by A. W. Kilbourne & Company 1,000 shares of Canada Southern Railway Company stock, $51,775; March 26, 1900, purchase by A. W. Kilbourne & Company, in account kept in the name of L. L. Kellogg, 500 shares of Norfolk & Western Railway Company stock, $18,812.50. That the said purchases and sales were conducted in the name of L. L. Kellogg for B. D. Greene and at the instance and request of B. D. Greene, the two items of purchases above referred to amounting to $70,587.50.

Fourth. Item April 6, 1900. Collected by A. W. Kilbourne & Company, for account of L. L. Kellogg, April —, 1900, dividend of 200 shares of Southern Railway preferred stock, $300.

Stipulation: That the said amount so collected was paid by A. W. Kilbourne & Company by check in favor of L. L. Kellogg, dated

April 6th, 1900, on the bank of New York National Banking Association, which check was endorsed by the said L. L. Kellogg over to the said B. D. Greene and deposited by said B. D. Greene to his own account in the Knickerbocker Trust Company.

147 Fifth. Item July 27, 1900. Sale by A. W. Kilbourne & Company, in account kept in the name of L. L. Kellogg, $5,000 par value bonds Missouri, Kansas & Texas Railway 2nds, $3,443.75.

Stipulation: That A. W. Kilbourne & Company paid said amount by check in favor of L. L. Kellogg $3,443.75, drawn on the Bank of New York National Banking Association July 27th, 1900, which check was endorsed by said L. L. Kellogg to Kellogg & Rose, and endorsed by Kellogg & Rose, and deposited in the American Exchange National Bank to their account, the said money being applied by them on account of legal services and disbursements claimed by them to be due them by B. D. Greene.

Sixth. Item October 16, 1900. Collection by A. W. Kilbourne & Company in account kept in the name of L. L. Kellogg, October, 1900, dividend on 200 shares Southern Railway preferred stock, $300.

Stipulation: That said collection was paid over October 16, 1900, to L. L. Kellogg by A. W. Kilbourne & Company, and by said Kellogg paid over to Kellogg & Rose on October 26th, 1900, as per his check No. 2007 on New York Security & Trust Company, said payment being on account of legal services and disbursements claimed by Kellogg & Rose to be due them from B. D. Greene.

Seventh. Item November 1, 1900. Sale by A. W. Kilbourne & Company in account kept in the name of L. L. Kellogg on 3,000 par value of bonds Missouri, Kansas & Texas Railway 2nds, $1,983.75.

Stipulation: That A. W. Kilbourne & Company paid over said amount to L. L. Kellogg by their check dated November 1, 1900, drawn on the Bank of New York National Banking Association, payable to said L. L. Kellogg, and which check was endorsed by L. L. Kellogg and by Kellogg & Rose, and deposited by the latter in the American Exchange National Bank to their credit, the same being applied on account of legal services and disbursements claimed by said Kellogg & Rose to be due them from said B. D. Greene.

Eighth. Item April 9, 1901. Collection by A. W. Kilbourne & Company in account kept in the name of L. L. Kellogg, April, 1901, dividend on 200 shares of Southern Railway preferred stock, $400.

Stipulation: That said dividend was paid over to said L. L. Kellogg by A. W. Kilbourne & Company by check payable to L. L. Kellogg, which check was endorsed by L. L. Kellogg to Kellogg & Rose, and by them deposited to their credit in the American Ex-

148 change National Bank, the same being applied on account of legal services and disbursements claimed by them to be due them from B. D. Greene.

Ninth. Item April 10, 1901. Sale by A. W. Kilbourne & Company in account kept in the name of L. L. Kellogg of 200 shares Southern Railway preferred stock, $15,746.

Stipulation. $15,000 of the proceeds of this check was turned over by Mr. L. L. Kellogg at the direction of B. D. Greene to Haven &

Scott, stock brokers, and by them used in the purchase of various securities, which securities were afterwards sold, the result of the speculation or transaction being a purchase of 1,000 shares of the stock of the Erie Railroad Company, which was delivered to B. D. Greene, as shown by his receipt; also in $1,507.41 cash, of which $1,500 was turned over and delivered to B. D. Greene personally in cash about the 16th day of May, 1901. This leaves as the result of the sale of the 200 shares of Southern Railway preferred stock, as mentioned in this item, 1,000 shares of Erie Railroad Company stock, and $1,500 cash in the hands of B. D. Greene, and $7.41 in the hands of Mr. Kellogg, which last amount is hereafter referred to.

Documentary evidence of the delivery to B. D. Greene of said Erie Company stock and of said $1,500 cash satisfactory to complainant's counsel has been submitted.

Tenth. Item July 16, 1901. Collection by A. W. Kilbourne & Company in account kept in the name of L. L. Kellogg, July, 1901, dividend on 490 shares of Norfolk and Western Railway Company common stock, $485.10.

Stipulation. That this amount was paid by A. W. Kilbourne & Company to L. L. Kellogg by their check drawn in his favor $485.10, endorsed by him to Kellogg & Rose, and by them deposited in the American Exchange National Bank, the same being applied by them on account of their claim for legal services and disbursements claimed by them to be due them from B. D. Greene.

Eleventh. Item October 8, 1901. Collected by A. W. Kilbourne & Company in account kept in the name of L. L. Kellogg, July, 1901, dividend on ten shares of Norfolk and Western Railway common stock, $9.90.

Stipulation. That said amount was paid over by Kilbourne & Company to L. L. Kellogg, the amount of which item is hereinafter referred to.

Twelfth. Item March 23, 1900. Purchase by A. W. Kilbourne & Company, in account kept in the name of L. L. Kellogg, 1,000 shares Canada Southern Railway Company stock, $51,775.

149 Stipulation. That the certificates for said 1,000 shares of Canada Southern Railway Company stock were delivered by A. W. Kilbourne & Company to L. L. Kellogg, and were by the said L. L. Kellogg delivered to B. D. Greene as follows: November 21, 1900, 100 shares; February 11, 1901, 100 shares; April 8, 1901, 800 shares; satisfactory documentary evidence of the delivery of said shares of stock by said L. L. Kellogg to B. D. Greene having been submitted to complainant's solicitor; that the complainant makes no claim in this action against said Kellogg for his connection with this transaction.

Thirteenth. Item March 26, 1900. Purchase by A. W. Kilbourne & Company, in account kept in the name of L. L. Kellogg, of 500 shares of Norfolk & Western Railway Company common stock, $18,812.50.

Stipulation. Certificates for this stock, No. 5896, 5897, and 5898, each for 100 shares, and No. 11077 for 90 shares and 74200 for

ten shares, are still in the possession of L. L. Kellogg and are the certificates of stock still standing in the name of L. L. Kellogg, which are a subject matter of this action. As to the balance of said item, namely, 100 shares represented by certificate No. 5895. This stock was sold at 62½ September 10, 1903, through Haven & Clement, stock brokers, in account kept in the name of F. Nevius, and the proceeds thereof went into account for the benefit of B. D. Greene in the name of F. Nevius, and which account was carried on with this money and other stock of B. D. Greene's. The account was closed on September 10th, 1903, and resulted in the payment to Mr. Nevius or Mr. Kellogg of $11,447.48.

The further disposition of the proceeds of these one hundred shares of Norfolk & Western Railway Company stock is not covered by this stipulation, but evidence relative thereto is to be taken under another stipulation between the parties relative to certain affidavits of Mr. Kellogg and Mr. Nevius.

Fourteenth. The following balances which are not specifically covered by the foregoing stipulations, to wit: Item of April 10, 1901, sale of Southern Railway stock, balance $746; item October 8, 1901, collection dividends on ten shares of Norfolk & Western stock, $9.90; and item for collection of proceeds of sale of Southern Railway Company stock, $7.41, which three items have been heretofore referred to in this stipulation, aggregate $753.31, and it is stipulated were received by L. L. Kellogg. Of this $113.25 was applied to the excess of purchases made by him of the 1,000 shares of Canada Southern stock and 500 shares of the Norfolk and Western stock over and above the moneys received by him from stock sold
150 by him to make said purchases as hereinbefore set forth, leaving a balance of $640.06. This is held by him on account of legal services and disbursements claimed by his firm to be due them from said B. D. Greene.

The foregoing stipulations wherever the expressions "moneys of B. D. Greene" or "check belonging to B. D. Greene" or equivalent expression is used, it is understood that such expressions are not used as settling the rights of the parties as between the United States and the defendant L. L. Kellogg of the claim made by the complainant that said property rightfully belongs to it, or as subject to its claim as a trust fund, nor does the defendant L. L. Kellogg intend thereby to admit such claim.

Dated New York, Dec. 21, 1905.

MARION ERWIN,
Special Asst. to Atty. Genl., Sol. for Complt.
KELLOGG & ROSE,
Solrs. for Deft. L. L. Kellogg.

Endorsed: Stipulation as to certain evidence. Dec. 21, 1905. No. 1. Filed in clerk's office of U. S. Circuit Court at Lynchburg, Va., Jan'y 1, 1906. Wm. McCauley, Clk. By W. M. Mauzy, D. C.

Stipulation No. 2.

(Dated Dec. 21, 1905.)

In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA
vs.
Benjamin D. Greene, L. L. Kellogg, et al.

In equity. Bill, &c. Agreement.

It is agreed between the parties appearing in said cause, evidenced by the signatures of their respective counsel attached hereto, as follows:

That the copy of the record and testimony of the witnesses on behalf of the United States, taken on the proceedings before Commissioner John A. Shields, for removal under section 1014, R. S., of Benjamin D. Greene and John F. Gaynor et al., from New York to Georgia, certified by said commissioner, and which is identified by the signatures of the undersigned solicitors, together with the blue print copy of Exhibit 319 therein referred to, and which is now by us attached thereto as true copy of said original Exhibit 319, and identified by the signatures of the undersigned solicitors, be considered as offered in evidence on behalf of complainant, and as if taken under examination and cross examination before an examiner in this cause:

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(a) Subject to all objections to the admissibility or competence of the evidence noted in said record, and subject to any and all additional objections which counsel may file before the closing of the taking of evidence on the part of the defense. It being the intent of this stipulation to avoid the re-taking before an examiner of testimony already taken before Commissioner Shields, but reserving all other objections. It is the intent, however, that any stipulation of counsel contained in the said record covering the admission of secondary evidence without the production of the originals shall stand.

(b) But the foregoing stipulation shall not apply to the testimony of Robert F. Westcott, now deceased, whose testimony is included in said copy of the record so certified by said commissioner.

As to said testimony of Robert F. Westcott, it is admitted that he did so testify in said removal proceedings, as set forth in said record, without further proof of said fact, but the defense reserves all objections to the use of said testimony, or admissibility, or competence of the same, or, any part thereof, in this cause—and the United States reserves the right to offer said testimony of Robert F. Westcott in evidence in this cause.

(2) That the following described affidavits with the exhibits thereto attached, which were offered on the part of the United States in evidence, at said hearing for injunction pendente lite, shall be considered as offered in evidence on behalf of complainant and as

if taken under examination and cross examination before an examiner in this cause, and without the necessity of producing the original books or documents before said examiner, but subject to all other objections as to their competence or admissibility in evidence, which may be filed by the defense at any time prior to the closing of the taking of the testimony on part of the defense, to wit:

Exhibit 700, affidavit of A. K. de Guiscard, purporting to prove:

"Extracts from the account books of the American Exchange National Bank, New York, showing certain loans made to Benjamin D. Greene."

Exhibit 701, affidavit of John G. Austin, purporting to prove:

152 "Extracts from the account books of Lee Livingston & Co., brokers, New York, showing all transactions with Benjamin D. Greene, from May 1st, 1892, to February 1st, 1900," with 2 checks attached.

"Extracts from the account books of Lee Kretschmar & Co., brokers, New York, showing all transactions with Benjamin D. Greene from February, 1900, to August 1st, 1903."

Exhibit 702, affidavit of A. K. de Guiscard purporting to prove:

"Extracts from the account books of the American Exchange National Bank, New York, showing the sale and purchase of certain securities for account of Benjamin D. Greene."

Exhibit 703, affidavit of Charles G. Kenney purporting to prove:

"Extracts from the account books of G. W. Dougherty & Co. and J. C. Whitney, brokers, New York, showing the sale of certain securities for account of the American Exchange National Bank, N. Y."

Exhibit 704, affidavit of Willis T. Wild purporting to prove:

"Extracts from the account books of Maxwell & Graves, brokers, New York, showing certain purchases and sales of securities for account of the American Exchange National Bank, New York."

Exhibit 705, affidavit of A. K. de Guiscard purporting to prove:

"Extracts from the account books of the American Exchange National Bank, New York, showing certain loans made to Benjamin D. Greene."

Exhibit 706, affidavit of William S. Dunloy in relation to certain certificates of stock of the Delaware, Lackawanna & Western R. R. Co.

Exhibit 707, affidavit of William G. Sage purporting to prove:

"Extracts from the account books of A. W. Kilbourne & Co., brokers, New York, showing certain transactions for account of L. Laflin Kellogg," with three checks attached.

Exhibit 708, affidavit of Edward I. Johnson, as to receipts by him from Attorney General of original check of July 27th, 1897, of B. D. Greene on Knickerbocker Trust Co., of New York, favor of Lee Livingston & Co. for $125,000.

Exhibit 709, affidavit of A. K. de Guiscard purporting to prove account of B. D. Greene with the American Exchange National

Bank, New York, for months of September, 1891, April, 1894, and December, 1894.

153 Exhibit 710, affidavit of Milton B. Van Zandt in relation to certain certificates of stock of the Chicago and Northwestern Railway Co.

Exhibit 711, affidavit of Perry Townsend in relation to certain certificates of stock of the Delaware & Hudson Canal Co.

Exhibit 712, affidavite of Abijah R. Brewer in relation to certain certificates of stock of the American Telegraph & Cable Co.

Exhibit 713, affidavit of Abijah R. Brewer in relation to certain certificates of stock of the American Telegraph & Cable Co.

Exhibit 714, affidavit of Joseph Janes, jr., in relation to certain certificates of stock of the Central Railway Co. of New Jersey.

Exhibit 715, affidavit of J. F. Atterbury in relation to $5,000 Richmond & West Point Terminal 5% Drexel Morgan & Co. receipts and certain certificates of stock of the Southern Railway Co.

Exhibit 717, affidavit of Edward I. Johnson purporting to identify the original proposals, bonds, and contracts offered in evidence and referred to by original number in removal proceedings. That the printed copy of the contracts herein referred to, which printed copy of the said contracts is in form of a printed volume which is identified by the signatures of the undersigned solicitors and which is now marked Exhibit 717 (a) be substituted in the record for said originals, the Government undertaking to hold the said originals subject to the inspection of counsel and of the court, if such inspection is desired by the counsel for either party or by the court.

Exhibit 718, affidavit of Edward I. Johnson purporting to identify certain accounts of Benjamin D. Greene with the American Exchange Bank and Knickerbocker Trust Co. offered in evidence and referred to by exhibit number in removal proceedings. That the copy of said accounts of B. D. Greene which is identified by the signatures of the undersigned solicitors and which is now marked Exhibit 718 (a) be substituted in the record in lieu of the originals as identified by said affidavit, the Government undertaking to hold said originals subject to the inspection of counsel and of the court, if such inspection is desired by the counsel for either party or by the court.

Exhibit 716, affidavit of Edward I. Johnson purporting to prove compilation from other exhibits.

154 (a) The defense shall have the right to call any of the witnesses whose affidavits or testimony are so offered for cross-examination before an examiner if so desired, but a failure to call such witness for cross-examination shall not affect the competency of the evidence.

(3) That the printed copy of the record and testimony of the witnesses on behalf of the defense taken on the proceedings before Commissioner John A. Shields, for removal under section 1014 R. S., of Benjamin D. Greene and John F. Gaynor et al. from New York to Georgia, which is now identified by the signatures of the under-

signed solicitors as Exhibit 719 and agreed upon as a true copy of said original testimony, with the exhibits therein referred to, such exhibits to be produced if required, be considered as offered in evidence on behalf of the defendants represented by said undersigned solicitors for defense and as if taken under examination and cross-examination before an examiner in this cause, subject to all similar objections on the part of the United States as is reserved for the defense in regard to the testimony of the United States in paragraph (1) "a" of this agreement.

(4) That this agreement is not intended to exclude either party from taking additional testimony should they so desire.

Dated at the city of New York this 21st day of December, 1905.

MARION ERWIN,
Special Asst. to Atty. Genl., Compl's. Solr.

KELLOGG & ROSE,
Solrs. for Deft. L. L. Kellogg.

[Endorsed:] Orig. 2nd stipulation, Dec. 21, 1905, as to certain evidence. Filed in clerk's office of U. S. circuit court at Lynchburg, Va., Jan'y 1, 1906. Wm. McCauley, clerk. By W. M. Mauzy, D. C.

155 In the United States District Court for the Western District of Virginia. Continued and held at Lynchburg, Virginia, on the 13th day of December, 1913.

UNITED STATES OF AMERICA, COMPLAINANT,
v.
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk and Western Railway Company, defendants, and intervention of Mary C. Leary, admx. of estate of Jas. D. Leary, dec'd.

Final decree.

This cause having come on to be finally heard and having been argued by counsel, upon consideration thereof, it was

Adjudged, ordered, and decreed:

1st. That the four hundred shares of the common stock of the Norfolk and Western Railway Company, now outstanding in the name of Luther Laflin Kellogg, evidenced by certificates C5896, C5897, C5898, 11077, and X74200, are the property of the complainant, the United States of America, free from the claims of all other parties hereto.

2d. That the aforesaid certificates of stock be canceled, and that said Luther Laflin Kellogg do within twenty days from this date, deliver said certificates to Marion Erwin, Esq., complainant's solicitor, to be by the latter delivered to the said Norfolk and Western Railway Company for entry of cancellation thereon.

3d. That said Norfolk and Western Railway Company do, upon delivery to it of said certificates of stock, issue and deliver a new certificate, or new certificates, for four hundred (400) shares of the common stock of said railway company to and in the name of such person, firm, or corporation as may be by letter of the Attorney General of the United States designated to said railway company to receive such new certificate or certificates. And such agent so designated by the Attorney General shall have power to sell said stock in such manner and on such terms as may be directed by the Attorney General, and the further power thereafter to transfer and deliver the aforesaid certificates to the purchaser or purchasers.

4th. And it appearing to the court that there has accumulated in the hands of the Norfolk and Western Railway Company
156 since the filing of the bill, dividends upon said 400 shares of stock of said Norfolk and Western Railway Company decreed to belong to the United States, aggregating the sum of $18,700.00 to the date of this decree, the said Norfolk and Western Railway Company is directed to pay the same together with any other dividends or profits thereof which may be or come into its hands prior to the execution by it of this paragraph of this decree, over to such person or firm as may be designated to it by the Attorney General to receive the same as agent of the United States.

5th. And it appearing to the court that there has been placed on deposit with the Guaranty Trust Company, of New York, the sum of $425.00, being the proceeds of a sale of subscription warrants in connection with the offer to the stockholders of the convertible bond issue of 1912 of the said Norfolk and Western Railway Company, the same representing a profit accruing since the filing of the bill on said 400 shares of stock of the Norfolk and Western Railway Company, and that the same was so placed on deposit subject to the orders of the court in this cause; the said Guaranty Trust Company of New York is directed to pay the same together with the profits thereof, if any, which have or may accrue thereon prior to the execution by it of this paragraph of this decree, over to such person or firm as may be designated to it by the Attorney General to receive the same as agent of the United States.

6th. That the moneys which come into the hands of the agent or agents designated by the Attorney General under paragraphs "3," "4," and "5" of this decree shall be held by such agent that the net proceeds thereof, after the payment of such proper charges and allowances therefrom as may be allowed by the Attorney General and approved by this court, shall be deposited in a designated depository of the United States to the credit of the Treasurer of the United States as a collection in this cause.

7th. The complainant shall have leave at the foot of this decree for such other and further relief as may be necessary to carry this decree into full execution.

8th. That the motion of said L. L. Kellogg that an allowance be made him from the fund in this cause be, and it is, overruled.

9th. The respective parties shall pay their own costs.

10th. That the clerk of this court do forthwith certify and transmit by mail a copy hereof to Luther Laflin Kellogg, Esq., care Messrs. Kellogg and Rose, at 115 Broadway, New York City, and to L. E. Johnson, Esq., president of the Norfolk and Western Railway Company, at Roanoke, Virginia.

157 Endorsed: Final decree. December 13, 1913. Enter: Henry C. McDowell, district judge. Entered Dec. 13, 1913. Stanley W. Martin, clerk. By Louis H. Price, deputy.

Order of January 6, 1914.

In the United States District Court for the Western District of Virginia. Continued and held at Lynchburg on January 6th, 1914.

UNITED STATES
v.
BENJAMIN D. GREENE ET AL. AND INTERVENTION
of Mary C. Leary, admx.

This cause having come on again to be heard, and Mary C. Leary, admx., by counsel, having announced her intention to prosecute an appeal from the decree of this court in this cause of December 13th, 1913, and having applied to the court to fix the amount of the supersedeas bond on such appeal; and,

Whereas it appears to the court that L. L. Kellogg has, in accordance with said decree, delivered into the hands of Marion Erwin, Esq., solicitor for the complainant, the five certificates of the shares of capital stock of the Norfolk & Western Railway Company mentioned in said decree, and as it further appears that there is now in the hands of the Norfolk & Western Railway Company the sum of $18,700, undistributed dividends upon said stock, and that there is also in the hands of the Guaranty Trust Company of New York the sum of $425.00, a part of the fund here in controversy, neither of which sums is bearing interest:

It is now, therefore, on motion of said Mary C. Leary, admx., ordered and decreed:

1st. That Marion Erwin, Esq., forthwith transmit and deliver the aforesaid certificates of stock to the clerk of this court at Lynchburg, to be by him safely held subject to such orders as may be hereafter made.

2nd. That the Norfolk and Western Railway Company be, and it is hereby, directed to pay within fifteen days from this date to the clerk of this court at Lynchburg the aforesaid sum of $18,700, to be by the said clerk deposited in the First National Bank of Lynchburg, on interest at the rate of 3% per annum, to the credit of this court in this cause and subject to the order of this court.

3rd. That the Guaranty Trust Company of New York do within fifteen days from this date pay to the clerk of this court

158 at Lynchburg the aforesaid sum of $425.00 to be by him deposited as aforesaid.

4th. That as and when any further dividends on the aforesaid stock of the Norfolk & Western Railway Company become due and payable during the pendency of this cause, the said Norfolk & Western Railway Company do pay the same to the aforesaid clerk of this court, to be by him deposited as aforesaid, including also any dividend declared, if any, since December 13, 1913.

5th. That the clerk certify an attested and sealed copy of this order to Marion Erwin, Esq., at No. 15 Williams St., New York City, N. Y.; to L. E. Johnson, Esq., president of the Norfolk & Western Railway Company, at Roanoke, Va.; and to the Guaranty Trust Company of New York City, N. Y.

6th. That the penalty of the supersedeas bond to be executed by or on behalf of Mary C. Leary, admx., be and it is hereby fixed at $1,100.00.

Endorsed: U. S. v. Greene et al. Order, January 6, 1914. Enter: Henry C. McDowell, district judge. Entered Jan'y 6, 1914. Stanley W. Martin, clerk. By Louis H. Price, deputy clerk.

Assignment of errors of Mary C. Leary, admx.

In the District Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, AND Norfolk & Western Railway Company, defendants. Intervention of Mary C. Leary, administratrix of James D. Leary.	In Equity.

Assignment of errors.

Now comes the above appellant, Mary C. Leary, administratrix of James D. Leary, deceased, and files herewith her petition, and says that there are errors in the records and proceedings of the above-entitled cause; and for the purpose of having the same reviewed in the United States Circuit Court of Appeals for the Fourth Circuit makes the following assignments of error, to wit:

159 First. The United States District Court for the Western District of Virginia, in its decree of December 13th, 1913, erred in holding and deciding that the four hundred (400) shares of the common stock of the Norfolk & Western Railway Company in the bill and proceedings mentioned, standing in the name of L. L. Kellogg and particularly described and referred to in the said decree of December 13th, 1913, together with the accumulated dividends thereon, are the property of the United States free from the claims of petitioner (appellant) thereto; and in not holding that

the said stock, together with the accumulated dividends thereon, are primarily liable and pledged to indemnify petitioner (appellant) and hold her and the estate of her decedent harmless to the extent of the amount paid as aforesaid by her as administratrix of the said James D. Leary, who was bail or bondsman for the said Benjamin D. Greene, to wit, the sum of $40,802.00, with interest from, to wit, the 31st day of December, 1910, being the amount of the judgment recovered against petitioner (appellant) by the complainant (United States), as aforesaid.

Second. The said district court erred in not sustaining the claim of petitioner (appellant) to an equity in, lien upon, or claim against the said shares of stock and the accumulated dividends thereon to the extent of the aforesaid sum of $40,802.00, with interest as aforesaid, paid by petitioner (appellant) to the complainant (United States) in satisfaction of the judgment of the complainant against petitioner as administratrix, as aforesaid, upon the forfeited bail bond, as set out in her said amended bill of intervention.

Third. The said district court erred in not excluding and refusing to consider the deposition of Robert F. Westcott, taken in criminal proceedings to which appellant was not a party, and who died before appellant was admitted into this suit and before she could call him for cross-examination, pursuant to the right given her by the Supreme Court of the United States in this cause.

Fourth. The said district court erred in holding and decreeing that complainant (United States) is entitled to the said four hundred (400) shares of Norfolk & Western Railway Company stock, and to the amount ($18,700) of dividends accumulated thereon in the hands of the Norfolk & Western Railway Company.

Fifth. The said district court erred in not holding and decreeing that the said stocks and accumulated dividends were first liable to petitioner (appellant) to the extent of the aforesaid judgment, interest, and costs, paid by her as administratrix of the estate of the
160 said James D. Leary to the said United States, under the contract, arrangement, and understanding set up in her amended bill of intervention, whereby the said stocks were dedicated and pledged to the indemnity of the said James D. Leary as bail or bondsman of the said Benjamin D. Greene.

Wherefore the said Mary C. Leary, administratrix of James D. Leary, deceased, appellant, prays that, for the errors aforesaid and other errors appearing in the record of said United States District Court for the Western District of Virginia, in the above entitled cause to the prejudice of the said appellant petitioner, the said judgment and decree of the said United States District Court for the Western District of Virginia, to wit, the decree entered therein December 13th, 1913, in said cause, be reversed, annulled, and for naught esteemed, and that said cause be remanded to the said United States District Court for the Western District of Virginia, with instructions for such further proceedings in said cause as may be

determined upon by this honorable court, to the end that justice may be done in the premises.

MARY C. LEARY,
Administratrix of James D. Leary, Appellant.
By J. T. COLEMAN and
AUBREY E. STRODE,
Her Solicitors.

Endorsed: Assignment of errors of Mary C. Leary, admx. Jas. D. Leary. Filed January 24, 1914. Stanley W. Martin, clerk. By Louis H. Price, deputy clerk.

Assignment of errors of L. L. Kellogg.

District Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA, COMPLAINANT,
against
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, Norfolk & Western Railway Company, and Mary C. Leary, as administratrix of James D. Leary, deceased, defendants.

Now comes Luther Laflin Kellogg, defendant, by his solicitor, and shows that in record and proceedings in the above entitled cause, and in the decree made therein December 13th, 1913, in favor of the complainant, and providing, among other things, that certain certificates of stock of the Norfolk and Western Railway Com-
161 pany be delivered by the defendant, Luther Laflin Kellogg, to the complainant's solicitor, to be by him delivered to the Norfolk and Western Railway Company for entry of cancellation, and for other relief, manifest error has occurred to the prejudice of the defendant, Luther Laflin Kellogg, particularly in the following matters:

First. The court erred in holding that the complainant was entitled to a decree directing the delivery and cancellation of certificates of stock of the Norfolk & Western Railway Company Nos. C-5896, C-5897, C-5898-11,077, and X-74,200, because there was no proof that said stock was purchased by moneys fraudulently received by the defendant Greene from the United States.

Second. That the court erred in holding that the complainant was entitled to the delivery of said shares of stock for cancellation, because the proof showed that the defendant Kellogg was a bona fide holder of the said stock and had an equity therein superior to that of the complainant, even if, as claimed by it, the said stock had been purchased with moneys alleged to have been fraudulently received by the defendant, Greene, from the United States.

Third. That the court erred in holding that the complainant was entitled to the delivery of said shares of stock for cancellation, because the moneys alleged to have been received by the defendant, Greene, from the Government were not shown to be the only source from which the moneys used in the purchase of said stock were drawn, but, on the contrary, the defendant, Greene, was shown to have been possessed of sources of income other than the moneys received from the Government which went into the purchase of said securities.

Fourth. That the court erred in holding that the complainant was entitled to the delivery of said stock for cancellation, because the evidence adduced conclusively shows that the said stock was purchased on a brokerage account conducted by said Greene with the firm of Lee, Livingston & Company, the moneys for which were advanced by said firm, and the cash paid in by said Greene was not for the purchase of the securities, but to discharge his indebtedness to the brokers for the moneys advanced by them to him.

Fifth. That the court erred in holding that the complainant was entitled to the delivery of said stock for cancellation, because the proof wholly failed to show that the identical moneys of the United States claimed to have been fraudulently converted did become a part of the property claimed, and on the contrary does show that such funds became confused with other property so as to be indistinguishable, and the right to follow said moneys was lost.

162 Sixth. That the court erred in holding that the complainant was entitled to the delivery of said stock for cancellation because said securities had been deposited with the defendant Kellogg under an express agreement that they should be held as indemnity for a loss by reason of one James D. Leary becoming bail for the defendant Greene in proceedings brought against him by the United States, and thereby an equitable lien was created in favor of the defendant Kellogg as trustee for the benefit of the estate of said James D. Leary, deceased, and there is no proof that said Kellogg had any notice or knowledge of the alleged fraud or the sources from which it is claimed the moneys used for the purchase of said securities had been derived.

Seventh. That the court erred in holding that the complainant was entitled to the delivery of said stock for cancellation because the said securities had been deposited under an agreement that they should be held by the defendant Kellogg as indemnity for loss by reason of James D. Leary becoming bail for said Benjamin D. Greene, and thereby an equitable lien was created thereon in favor of the defendant Kellogg as trustee for the benefit of the Leary estate, and there was no proof that the said James D. Leary had any notice of the alleged fraud or the sources from which was claimed the moneys used for the purchase of said securities had been derived.

Eighth. That the court erred in holding that the testimony of Robert F. Westcott, given in the proceedings before the United States Commissioner for the Southern District of New York to remove the

defendant Benjamin D. Greene to the Southern District of Georgia for trial, was admissible in evidence for the purpose of showing that the stock in question had been purchased by moneys alleged to have been fraudulently obtained by the defendant Greene from the United States, or for any purpose whatsoever.

Ninth. That the court erred in rendering said decree of December 13th, 1913, and in holding that the complainant was entitled to the relief therein granted.

ABRAM J. ROSE,
Solicitor for Deft. Luther Laflin Kellogg.

(Office and post office address, 115 Broadway, Borough of Manhattan, city of New York.)

Endorsed: U. S. District Court, Western District of Virginia. United States of America, complainant, against Benjamin D. Greene, Luther Laflin Kellogg & others, defendants. Assignment of errors. Filed February 27, 1914. Stanley W. Martin, clerk.

163 In the District Court of the United States for the Western District of Virginia.

In equity. Bill, &c. Intervention. Final decree Dec. 13, 1913. Appeal.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG and the Norfolk & Western Railway Co., defendants, and Mary C. Leary, administratrix, intervenor.

Stipulation relative to record facts, etc., on appeal, &c.

Whereas Mary C. Leary, as administratrix, intervenor in the above-stated cause on January 24th, 1914, entered her appeal to the U. S. Circuit Court of Appeals for the Fourth Circuit from the final decree of December 13th, 1913, in this cause, and

Whereas on March 27, 1914, a certain stipulation was entered into and filed of record between the said Mary C. Leary, administratrix, and the United States for the purpose of shortening the transcript of the record on appeal relative to the facts, etc., and

Whereas on February 27th, 1914, the said L. Laflin Kellogg filed a petition for appeal to the said Circuit Court of Appeals for the Fourth Circuit from said decree of December 13th, 1913, which is duly allowed by the said District Court.

Now, therefore, it is stipulated by the undersigned that the said L. Laflin Kellogg joins in, ratifies, and confirms said stipulation of March 27, 1914, in respect to said appeal and to make the same applicable to the record on his appeal of February 27th, 1914, and all

the other parties who may sign hereto assent to this stipulation and that the transcript of record as made on the appeal of the said intervenor and the papers and document sent up under the terms of said stipulation of March 27th, 1914, shall be considered as the transcript of the record on said appeal of said L. Laflin Kellogg under like terms and admissions on the part of said Kellogg as apply to said intervenor and the clerk of said District Court shall send up to said Circuit Court of Appeals, the original petition for the appeal of said L. Laflin Kellogg from said decree of December 13th, 1913, the order allowing the appeal, the appeal bond, the citation, the returns of waivers of service and any other papers and documents,
164 which, under the rules of the Circuit Court of Appeals he is required to send up outside of the aforesaid transcript.

The clerk shall send up a copy of this stipulation along with the said transcript of the record on the appeal of said intervenor.

Dated, New York, March 31st, 1914.

ABRAM J. ROSE,
Solicitor for Luther Laflin Kellogg.
MARION ERWIN,
Special Asst. to the Atty.-Genl.,
Solicitor for United States.
J. T. COLEMAN and
AUBREY E. STRODE,
Solicitors for Mary C. Leary,
Administratrix of James D. Leary, Dec'd.

Endorsed: Stipulation relative to record, facts, etc., on appeal, etc. Filed April 8th, 1914. Stanley W. Martin, clerk.

Clerk's certificate.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

I, Stanley W. Martin, clerk of the District Court of the United States for the Western District of Virginia, in the fourth circuit, at Lynchburg, Virginia, in said district, do certify that the foregoing printed record as corrected by me, is a true transcript of so much of the record of the chancery cause of United States vs. B. D. Greene et al. on file in this court, as, by stipulation of counsel filed with the record in this cause, said counsel have desired inserted in the transcript.

In testimony whereof I hereunto set my hand and affix the seal of said court at Lynchburg, Virginia, in said district, this 22 day of April, 1914.

STANLEY W. MARTIN,
Clerk United States District Court
for the Western District of Virginia.

Memorandum of clerk as provided for by sec. 7 of rule 14 of the United States Circuit Court of Appeals, Fourth Circuit, is omitted, as the facts are set out in full in the stipulation contained in the Transcript of Record.

STANLEY W. MARTIN, *Clerk.*

165 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS of James D. Leary, deceased, appellants,
versus
THE UNITED STATES OF AMERICA AND LUTHER LAFLIN Kellogg, appellees.
No. 1277.

On the same day, to-wit, April 24, 1914, original petition for appeal, order allowing appeal, appeal bond, and citation are certified up under sec. 7 of rule 14.

Order extending time to file record. Filed April 24, 1914.

UNITED STATES OF AMERICA
v.
BENJ. D. GREENE AND OTHERS.
Order—February 28th, 1914.

For satisfactory reasons appearing to the court, it is ordered that the time within which the record on the appeal of Mary C. Leary, administratrix of James D. Leary, deceased, from the decree herein, of December 13th, 1913, be transcribed, printed, and filed in the clerk's office of the appellate court be, and the same is hereby, extended for the term of sixty (60) days from the 1st day of March, 1914.

Endorsed: "Enter Henry C. McDowell."

Same day, twenty four copies of the printed record are filed.

Same day, original exhibits are certified up.

Same day, the appearance of J. T. Coleman and Aubrey E. Strode is entered for the appellants.

April 27, 1914, the appearance of Marion Erwin, special assistant to the Attorney General, is entered for the appellee, the United States.

May 2, 1914, the appearance of Abram J. Rose is entered for the appellee, Luther Laflin Kellogg.

Dec. 2, 1914, cause continued by consent.

Feb. 2, 1915, cause passed.

Feb. 16, 1915, cause continued until May term, 1915, by consent.

165a LUTHER LAFLIN KELLOGG, APPELLANT,
v.
THE UNITED STATES OF AMERICA, NORFOLK AND WESTERN Railroad Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees. } No. 1278.

On the same day, to wit, April 24, 1914, original petition for appeal, order allowing appeal, appeal bond, praecipe, and citation are certified up under sec. 7 of rule 14.

Order extending time to file record. Filed April 24, 1914.

UNITED STATES OF AMERICA
v.
BENJ. D. GREENE AND OTHERS. } Order—February 28th, 1914.

For satisfactory reasons appearing to the court, it is ordered that the time within which the record on the appeal of Mary C. Leary, administratrix of James D. Leary, deceased, from the decree herein of December 13th, 1913, be transcribed, printed, and filed in the clerk's office of the appellate court be, and the same is hereby, extended for the term of sixty (60) days from the 1st day of March, 1914.

Endorsed: "Enter Henry C. McDowell."

Same day, twenty four copies of the printed record are filed.

Same day, the appearance of Abram J. Rose is entered for the appellant.

April 27, 1914, the appearance of Marion Erwin, special assistant to the Attorney General, is entered for the appellee, the United States.

May 1, 1914, the appearance of Theodore W. Reath and F. S. Kirkpatrick is entered for the appellee, the Norfolk & Western Railway Company.

May 5, 1914, the appearance of Aubrey E. Strode and J. T. Coleman is entered for the appellee, Mary C. Leary, administratrix.

Dec. 2, 1914, cause continued by consent.

Feb. 2, 1915, cause passed.

Feb. 16, 1915, cause continued until May term, 1915, by consent.

166 Suggestion of the death of the appellant, Mary C. Leary, administratrix of James D. Leary, deceased, and motion to make Daniel J. Leary and George Leary, administrators, parties appellants in place of Mary C. Leary, deceased. Filed Feb. 18, 1915. In the United States Circuit Court of Appeals, Fourth Circuit.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. Leary, deceased, appellant,
vs.
THE UNITED STATES OF AMERICA ET AL., APPELLEES. } No. 1277.

LUTHER LAFLIN KELLOGG, APPELLANT,
vs.
THE UNITED STATES OF AMERICA ET AL., APPELLEES. } No. 1278.

And now comes Daniel J. Leary and George Leary, as administrators of the estate of James D. Leary, deceased, and voluntarily entering their appearance in the cause in which the above-stated appeals were taken, aver as follows:

That the said Mary C. Leary, who, as administratrix of the estate of James D. Leary, deceased, was appellant in said appeal No. 1277 and appellee in appeal No. 1278, as numbered upon the docket of this court, has departed this life since the said appeals were taken.

That the said Mary C. Leary had been duly appointed such administratrix by the surrogate of the county of New York, State of New York, having jurisdiction to make such appointment, and since her decease the surrogate of New York County, State of New York, having jurisdiction to make such appointment, has duly appointed
the said Daniel J. Leary and George Leary administrators
167 of the estate of said James D. Leary, deceased, in place of
said Mary C. Leary, administratrix, deceased, with the full powers, duties, and obligations of administrators de bonis non of the estate of said James D. Leary, deceased, and that the said Daniel J. Leary and George Leary have each duly qualified as such administrators and letters of administration have been issued to them, exemplified copies of which are hereto annexed. Wherefore they pray that this court will, by appropriate order, make them parties appellant in said appeal No. 1277 in place of Mary C. Leary, administratrix, appellant, deceased, and make them parties appellees in said appeal No. 1278 in the place of said Mary C. Leary, administratrix, appellee, deceased, and that they be fully substituted as parties to said cause in place of said Mary C. Leary, administratrix, deceased, in all respects.

Dated this February 15, 1915.

DANIEL J. LEARY,
Administrator as aforesaid.
GEORGE LEARY,
Administrator as aforesaid.

168 Letters of administration granted to Daniel J. Leary and George Leary upon the estate of James D. Leary, deceased. Filed Feb. 18, 1915.

The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye, that we, having examined the records and files in the office of the surrogate of the county of New York, do find there remaining a certain record of letters of administration de bonis non granted to George Leary and Daniel J. Leary upon the estate of

James D. Leary, deceased, in the words and figures following, to wit:

(Seal of New York surrogate.)

The people of the State of New York to George Leary, of New York City, and to Daniel J. Leary, send greeting:

Whereas James D. Leary departed this life intestate on the 11th day of April, 1902, being at or immediately previous to his death an inhabitant of the county of New York, by means whereof the ordering and granting administration of all and singular the goods, chattels, and credits whereof the said intestate died possessed, in the State of New York, and also the auditing, allowing, and final discharging the account thereof, doth appertain unto us, and we being desirous that the goods, chattels, and the credits of the said intestate may be well and faithfully administered, applied, and disposed of, do grant unto you, the said George Leary and Daniel J. Leary, the full power by these presents to administer and faithfully dispose of all and singular the said goods, chattels, and the credits, ask, demand, recover, and receive the debts which unto the said intestate whilst living and at the time of his death did be-
169 long, and to pay the debts which the said intestate did owe, as far as such goods, chattels, and credits will thereunto extend and the law require; hereby requiring you to make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said intestate, within a reasonable time, and return a duplicate thereof to our surrogate of the county of New York, within three months from the date of these presents; and if further personal property, or assets of any kind, not mentioned in any inventory that shall have been so made, shall come to your possession or knowledge, to make or cause to be made in like manner a true and perfect inventory thereof, and return the same within two months after the discovery thereof, and also to render a just and true account of administration, when thereunto required; and we do, by these presents, depute, constitute, and appoint you, the said George Leary and Daniel J. Leary, administrators de bonis non of all and singular the goods, chattels, and credits of the said James D. Leary, deceased.

In testimony whereof we have caused the seal of office of the Surrogates' Court of the county of New York to be hereunto affixed.

Witness, Hon. Robert Ludlow Fowler, a surrogate of said county, at the city of New York, the 3rd day of Feby., in the year of our Lord one thousand nine hundred and fifteen.

[L. S.] DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

170 All which we have caused by these presents to be exemplified, and the seal of our said surrogates' court to be hereunto affixed.

Witness, Hon. John P. Cohalan, a surrogate of the county of New York, at the city of New York, the 11th day of February, in the year of our Lord one thousand nine hundred and fifteen, and of our independence the one hundred and thirty-ninth.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

(New York surrogate's seal.)

I, John P. Cohalan, a surrogate of said county and presiding magistrate of the Surrogates' Court, do hereby certify that Daniel J. Dowdney, whose name is subscribed to the preceding exemplification, is the clerk of said Surrogates' Court of the County of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogates' Court, and that the attestation thereof is in due form and according to the form of attestation used in this State.

Dated New York, February 11th, 1915.

JOHN P. COHALAN, *Surrogate.*

STATE OF NEW YORK,
County of New York, ss:

I, Daniel J. Dowdney, clerk of the Surrogates' Court of the County of New York, do hereby certify that Hon. John P. Cohalan, whose name is subscribed to the preceding certificate, is the presiding magistrate of the Surrogates' Court of the County of New York, duly elected, sworn, and qualified, and that the signature of said magistrate to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 11th day of February, 1915.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

(New York surrogate's seal.)
(Revenue stamp, 10 cents, cancelled.)

171 Order making Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, parties appellants in the place of Mary C. Leary, deceased. Filed and entered Feb. 18, 1915. In the United States Circuit Court of Appeals, Fourth Circuit.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, deceased, appellant,
vs.
THE UNITED STATES OF AMERICA ET AL., APPELLEES. } No. 1277.

LUTHER LAFLIN KELLOGG, APPELLANT,
vs.
THE UNITED STATES OF AMERICA ET AL., APPELLEES. } No. 1278.

It appearing to the court that the death, since the taking of the above stated appeals, of Mary C. Leary, administratrix of James D.

Leary, deceased, having been duly suggested of record, and that Daniel J. Leary and George Leary have been duly appointed administrators of the estate of said James D. Leary, deceased, by the surrogate of New York County, State of New York, in place of Mary C. Leary, administratrix, deceased, with the full powers, duties, and obligations of administrators de bonis non of said James D. Leary, deceased, and each has duly qualified as such administrator, and that they have voluntarily appeared in this court and presented exemplified copies of their letters of administration and requested this court for the order herein made, and all parties having consented thereto:

It is ordered by the court: That the said Daniel J. Leary
172 and the said George Leary, as such administrators of the estate of James D. Leary, deceased, are made parties appellant in said appeal No. 1277 in place of Mary C. Leary, administratrix, deceased, and are made parties appellees in said appeal No. 1278 in the place of said Mary C. Leary, appellee, deceased, and that they be fully substituted as parties to said cause in place of said Mary C. Leary, administratrix, in all respects.

MARTIN A. KNAPP,
U. S. Circuit Judge.

FEBY. 18, 1915.

We consent to the above order.

MARION ERWIN,
Special Assistant to the Attorney General,
Solicitor for the United States.
ABRAM J. ROSE,
Solicitor for Luther Laflin Kellogg.
J. T. COLEMAN,
AUBREY E. STRODE,
Solicitors for Daniel J. Leary and George Leary, Administrators, and Solicitors of Record for Mary C. Leary, now deceased.

173 May 4, 1915 (May term, 1915), cause came on to be heard before Knapp and Woods, circuit judges, and Waddill, district judge, and is argued by counsel and submitted.

174 *Opinion. Filed November 12, 1915.*

United States Circuit Court of Appeals, Fourth Circuit.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS of James D. Leary, deceased, appellants.
versus
THE UNITED STATES OF AMERICA AND LUTHER LAFLIN Kellogg, appellees.
No. 1277.

and

LUTHER LAFLIN KELLOGG, APPELLANT,
versus
THE UNITED STATES OF AMERICA, NORFOLK AND WESTERN RAILWAY COMPANY, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees. } No. 1278.

Appeals from the District Court of the United States for the Western District of Virginia, at Lynchburg.

(Argued May 4, 1915. Decided November 12, 1915.)

Before Knapp and Woods, circuit judges, and Waddill, district judge.

175 Aubrey E. Strode and J. T. Coleman (Coleman, Easley & Coleman on brief) for the administrators of James D. Leary, deceased; Abram J. Rose for Luther Laflin Kellogg, and Marion Erwin, special assistant to the Attorney General, for the United States.

Knapp, circuit judge.

For a preliminary statement of facts reference is made to the opinion of this court on the former appeal, 184 Fed., 433, and the opinion of the Supreme Court to which the case was afterwards taken, 224 U. S., 567.

The Supreme Court held that the petition filed by Mrs. Leary "showed a sufficient right to intervene," and that she ought to be allowed to try to prove her case, notwithstanding the objections which the courts below had sustained. Following this decision an amended petition was filed in May, 1913, which is substantially the same as the original with the addition of a paragraph from the first answer of Kellogg, and an averment that she has paid the judgment of the United States against the Leary estate. The claims set up in this petition are controverted in the Government's answer thereto, but the pleadings raise no issue between Mrs. Leary and Kellogg. There was a full hearing of the case in the court below, and a final decree entered in December, 1913, to the effect that the four hundred shares of Norfolk & Western stock, which are the subject of controversy, belong to complainant, the United States of America, "free from the claims of all other parties hereto." No findings were made or opinion filed by the learned district judge, and we are therefore not advised of the grounds upon which he based his decision. Separate appeals were taken by Mrs.

176 Leary and Kellogg, but they are consolidated in a single record and may be disposed of in one opinion.

For the purposes of this appeal we shall assume, without discussing the evidence, that the Norfolk & Western shares, or [illegible]ities for which they were substituted, were purchased by Greene [illegible] funds of which he had defrauded the Government. It follows from this that the intervention cannot be sustained on the theory that the

United States has failed to prove with requisite certainty that moneys stolen from it are represented by the stock in question, and nothing further need be said upon that branch of the case.

The first bond signed by Leary was on the 14th of December, 1899, and we think it must be held that neither Leary nor Kellogg then knew or had reason to believe that the securities which Greene placed in Kellogg's hands about that time were not honestly acquired. It is not claimed that Leary had any knowledge or even suspicion of Greene's misconduct, and the only ground upon which knowledge is sought to be imputed to Kellogg is the fact that he was Greene's attorney. But this of itself is not enough to justify the inference that he either knew or ought to have known that the securities which Greene turned over to him were the fruits of criminal wrongdoing. The presumption is to the contrary. Evans v. Mansur & Tebbetts Implement Co., 87 Fed., 275. Especially is this so since it appears that Kellogg had no personal connection with the defense of Greene in the criminal proceedings instituted against him until long after the transfer of the securities in question. Moreover, Kellogg meets the implication that he was cognizant of Greene's fraudulent conduct with explicit and positive denial. In an affidavit of October 27, 1913, received under stipulation as testimony, he says:

"That at the time of the institution of the proceedings by the United States against said Greene, based on the alleged fraudulent transactions referred to in the bill herein, viz, in December,
177 1899, and on December 14th, 1899, when there was deposited with him certain securities, deponent had no knowledge of the sources from which said securities were acquired other than the fact that they were turned over to deponent by said Greene as the owner thereof. That said securities were received by deponent in absolute good faith and without suspicion or notice of any flaw or taint in their title, or of any fraud in their acquisition, or of any adverse claim whatsoever.

* * * * * * *

"That at the time of the receipt of said securities and during the pendency of the proceedings instituted by the United States, said Greene denied he had been in any way guilty of any fraud in connection with the matters referred to in the complaint, and deponent so believed and now believes."

In this affidavit he further states with some detail the circumstances of his acquaintance and professional employment by Greene, the enterprises and litigation in which Greene was engaged, with other facts tending to show that Greene was a man of standing and importance in the business world and possessed of considerable means. These statements are in no wise contradicted, and they indicate that Kellogg was warranted in assuming without question that the securities turned over to him had been honestly acquired by Greene in business transactions with which the Government was not concerned, and that his ownership of the same was free from

suspicion. In short, the evidence fails to sustain the Government's contention respecting Kellogg's knowledge, and it must therefore be held that he came into possession of the securities in question without reason to suspect that they had been purchased with stolen money.

Accepting the fact that Kellogg acted in good faith in receiving the stock transferred to him, and that his title thereto was untainted by knowledge or suspicion of the frauds committed by Greene, the case here presented, so far as the merits are concerned, comes directly to the question whether the bond of January 20, 1902, which
178 Greene forfeited by failure to appear, and which Leary's estate afterwards had to pay, was signed by Leary "upon the condition and understanding," as alleged in the petition, that the securities held by Kellogg should remain and continue in his hands as indemnity to Leary for signing the last mentioned bond. The answer to this question depends upon the probative force of the evidence offered in support of the allegation, and that evidence will now be considered. It consists in part of the following letters:

"NEW YORK, *December 14, 1899.*

"JAMES D. LEARY, Esq.

"MY DEAR SIR: Captain Benjamin D. Greene has placed in my hands, as indemnity to you for becoming his bondsman in the matter of the United States against Greene, Gaynor, and others now pending in the district court, three hundred shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company.

"It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligation. I am,

"Yours, truly,

"L. LAFLIN KELLOGG.

"NEW YORK, *May 21st, 1901.*

"JAMES D. LEARY, Esq.

"MY DEAR MR. LEARY: It will be necessary to renew the bail given by you for Capt. Greene, and for which I hold the security for your protection, on Thursday morning next at 10.30.

"Will you kindly come to this office for that purpose about 10.15. I am very sorry to trouble you but it cannot be helped. This new bond is to take the place of the old one, without additional liability.

"Yours, truly,

"L. LAFLIN KELLOGG.

179 "NEW YORK, *June 6th, 1901.*

"JAMES D. LEARY, Esq.

"MY DEAR MR. LEARY: I am obliged to trouble you again to renew the bond in the Greene and Gaynor matter. I will have to trouble you to be in court between ten and half past ten Saturday morning.

"The reason for the matter is not that you have to incur any additional liability but simply to enable them to carry their case to the United States Supreme Court.

"All the parties and all the other bondsmen will be on hand before Judge Lacombe by a special arrangement (as the judge is going away) on Saturday morning at half past ten.

"Please let me hear from you today as the matter is most important.

"With kindest regards, and hoping that you did not suffer from your misstep in the office, I am,

"Yours, very truly,

"L. LAFLIN KELLOGG."

In the original answer of Kellogg, verified March 1, 1904, which was also to be treated as an affidavit, the following allegations appear:

"That at the time of the arrest of said Benjamin D. Greene, in December, 1899, he was held to bail in the sum of $25,000; that a friend and client of defendant, one Leary, became surety on the bond for his appearance before the commissioner in the sum of $25,000 on defendant's giving to said Leary a written guarantee to hold him, Leary, harmless from loss or damage by reason of his becoming surety for said Greene.

"That at about that time said Greene deposited with defendant some securities for the purpose of indemnifying defendant against loss by reason of having indemnified said Leary, with the understanding that at any time he desired he might withdraw the securities so deposited and dispose of them, substituting others in their place; that the securities so deposited were also to be held by
180 the respondent to secure him for the fees and disbursements that might be incurred by him or his firm in defending said Greene or in caring for his interests in any proceedings brought by the United States against him, or in any other matters, there being several matters of litigation in which said Greene was interested pending in the respondent's office.

"That from time to time the securities so deposited were withdrawn by Greene and others substituted in their place, and that the Norfolk & Western stock, now in defendant's hands, are securities that the defendant deposited or substituted in place of those originally deposited, and the respondent now avers that he holds said Norfolk & Western stock as a bona fide holder, as security for the obligation that he is under to the said Leary by reason of his having become surety on said bond, or by reason of the said Leary having gone upon another bond for the sum of $40,000 for Greene's appearance in the State of Georgia after the conclusion of the said removal proceedings, the agreement to indemnify Leary having been extended to cover said last mentioned bonds, and also to secure the payment to the respondent and to his firm of the various sums of money that he has advanced and for services rendered for said Greene in various matters since that time."

If the amended answer of Kellogg, verified October 3, 1913, by omission or statement, appears to be at variance in any respect with the allegations above quoted, it is sufficient to say that this answer was allowed to be filed only against the United States and not as against Mrs. Leary. It may be observed, however, that the amended answer sets up no claim of existing indebtedness against Greene for the payment of which the Norfolk & Western stock is held. Indeed, it is inferrable from the record, as we understand it, that Kellogg does not now assert any personal claim to the fund in litigation except perhaps for such sum as he may ask to have allowed for counsel fees and expenses in protecting the trust.

The foregoing is in substance the proof which Mrs. Leary
181 makes of her right to the stock in question as against the United States. Does it show with sufficient certainty an agreement to protect Leary from liability on the forfeited bail bond, and is the Norfolk & Western stock the indemnity fund contemplated by the parties? We are of opinion that these questions should be answered in the affirmative. That some contract was made for the protection of Leary can hardly be denied. The Kellogg letter of December 14, 1899, admits of no other explanation. It shows that a specified security was placed by Greene in the hands of Kellogg for the express purpose of indemnifying Leary against liability as Greene's bondsman in the matter therein mentioned, namely, "the matter of the United States against Greene." True, it says that the stocks described is to be held "until you are released from the said bond," which was the bond that day executed. But in view of what followed is it not quite unreasonable to suppose that these words expressed the full intent and purpose for which the stock was placed in Kellogg's hands? Plainly the "matter" referred to was the removal of Greene from New York, where he was arrested, to the southern district of Georgia, to answer an indictment there found against him; and it is undeniable that all the bonds signed by Leary, including the one forfeited, were given at various stages of the removal proceedings, and that all of them had reference to his appearance for trial in the district where he was indicted. They were different parts, so to speak, of a single transaction. It is therefore difficult to believe that the indemnity promise was intended to be limited to the first obligation. Kellogg evidently had no such understanding when he wrote Leary on the 21st of May, 1901, more than five months later, that it would be necessary for him "to renew the bail given by you for Captain Greene, and for which I hold the security for your protection," and closed his letter by saying, "this new bond is to take the place of the old one without additional liability." This is a clear declaration that the security he held
182 would cover the renewed obligation, and we do not see that anything else can be made of it.

In the letter of June 6, 1901, when occasion arose for another bond, Kellogg writes, "I am obliged to trouble you again to renew the bond in the Greene and Gaynor matter," and goes on to assure Leary

that he will not thereby incur any increase of liability. But this assurance necessarily involved the assertion that the stock in his hands would be held for Leary's security. It is true that no letter is produced which refers specifically to the defaulted bond of January 20, 1902, but Kellogg's answer barely two years later, quoted from above, avers in substance that the "agreement" to indemnify Leary was extended to cover the $40,000 bond given for Greene's appearance in Georgia after the conclusion of the removal proceedings; and this averment finds strong support in the situation then existing and the previous relations of the parties. Indeed, it is not to be supposed that Leary, who required security before signing the initial bond, would have been willing to incur increased liability on the final bond without provision for his protection. The probabilities all point in the opposite direction.

That the promise to indemnify Leary covered his last obligation is further indicated by the fact, not otherwise explained, that the Norfolk & Western stock has continued to remain in Kellogg's hands, although it appears that other securities were long ago returned to Greene and all transactions between them concluded. And in this connection it may be noted that Kellogg on this appeal assigns error in the decision of the court below, awarding the stock to the United States, "because the said securities had been deposited under an agreement that they should be held by the defendant Kellogg as indemnity for loss by reason of James D. Leary becoming bail for said Benjamin D. Greene, and thereby an equitable lien was created thereon in favor of the defendant Kellogg as trustee for the benefit of the Leary estate."

183 It seems evident that Greene could not be heard to say, after the continuing force of the indemnity promise had been twice recognized, that it was not intended to cover the last obligation assumed, merely because Leary did not get another written assurance that the stock in Kellogg's hands was held for his protection. And we are of opinion that the United States has no better standing than Greene to deny the continuing force of an agreement to which it was not a party, and as to which Leary had no reason to suppose, when it was made, that the United States had or could have the slightest interest.

Nor does it appear to us doubtful that the Norfolk & Western stock, which stands in the name of Kellogg, constitutes the trust fund from which Leary's estate may claim reimbursement. Kellogg says that Greene reserved the right to exchange the securities he transferred, and that the Norfolk & Western stock was, in fact, substituted for the D., L. & W. stock originally deposited. If the stock first placed in Kellogg's hands was impressed with a trust in favor of Leary, the stock that replaced it became impressed with the same trust when the substitution took place, because it was then set apart and pledged for the protection of Leary.

Of the contention that Mrs. Leary's claim rests wholly upon an implied promise the Supreme Court said:

"We lay on one side the suggestion that the intervention goes only upon an implied contract in its proper sense of an obligation raised by the law irrespective of any real promise. That would seem to us a perverted interpretation of the words 'upon the understanding and condition' even if the contract were only a general one to indemnify, but a contract that certain specific stock in the hands of a trustee should be held as security for a specific contingent claim could not exist unless it was express. It would be none the less express if it was conveyed by acts importing it than if it was stated in words."

The case presented by the record is surely not want-
184 ing in proof of a "real promise"; Kellogg's letter of December 14, 1899, says, in so many words, that Greene had placed three hundred shares of D., L. & W. stock in his hands to indemnify Leary as bondsman for Greene, and this of itself is ample evidence of an express contract. The only subject of question is the scope and extent of the contract actually made. That it covered the bond of January 20, 1902, and was so intended, seems established with reasonable certainty by the written declarations of Kellogg, by the nature of the situation in which the parties were placed, and by the unmistakable import of their acts.

We are therefore constrained to hold, taking all the facts and circumstances into account, that the stock which Greene turned over to Kellogg was intended to be a continuing security for the protection of Leary as the bondsman of Greene in the removal proceedings, and that it constituted an indemnity fund not only for the prior bonds which were exonerated, but for the final obligation under which his estate has been compelled to pay the judgment in favor of the United States.

The objection that Greene was not made a party to the intervention needs but a word of comment. The record shows that Greene had actual notice of the proceeding by the personal service upon him of a copy of the petition and proposed bill of intervention, with a copy of the order of the court citing him to show cause "against the granting of leave to file said petition and the granting of the prayers of said petition"; and this order stated that "such service of copies shall be sufficient service to entitle the court to proceed herein and to adjudicate upon the filing of said petition and the prayers thereof." The amended petition differs from the original in no material respect so far as Greene is concerned, and he cannot be heard to complain because he was not notified of the amended intervention.

Moreover, Greene had long before suffered default and the
185 Government had taken a pro confesso decree against him. This operated to divest him of any interest in the stock, certainly as against the United States, and it is only in a technical sense that he can be said to be a necessary party to the intervention. The contest here is between Leary's estate and the Government, and the Government is protected from Greene by the pro confesso decree whether the estate wins or loses. We are not disposed to sustain an

objection which apparently was not made on the former appeal, either in this court or the Supreme Court, and which in no aspect of the case is of any practical importance.

For the reasons above stated we are of opinion that the estate of Leary has established a claim to the stock in question which is superior to the claim of the United States, and it follows that the decree appealed from must be reversed.

186 *Decree. Filed and entered November 12, 1915.*

United States Circuit Court of Appeals, Fourth Circuit.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS OF James D. Leary, deceased, appellants,
vs.
THE UNITED STATES OF AMERICA AND LUTHER LAFLIN Kellogg, appellees. } No. 1277.

Appeal from the District Court of the United States for the Western District of Virginia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Virginia, at Lynchburg, for further proceedings in accordance with the opinion of this court.

MARTIN A. KNAPP,
U. S. Circuit Judge.

NOVEMBER 12, 1915.

187 *Decree. Filed and entered November 12, 1915.*

United States Circuit Court of Appeals, Fourth Circuit.

LUTHER LAFLIN KELLOGG, APPELLANT,
vs.
THE UNITED STATES OF AMERICA, NORFOLK AND WESTERN Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees. } No. 1278.

Appeal from the District Court of the United States for the Western District of Virginia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Virginia, at Lynchburg, for further proceedings in accordance with the opinion of this court.

MARTIN A. KNAPP,
U. S. Circuit Judge.

NOVEMBER 12, 1915.

188 *Petition for appeal. Filed December 16, 1915.*

In the United States Circuit Court of Appeals, Fourth Circuit.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS of James D. Leary, deceased, appellants,
versus
THE UNITED STATES OF AMERICA AND LUTHER Laflin Kellogg, appellees. } No. 1277.

LUTHER LAFLIN KELLOGG, APPELLANT,
versus
THE UNITED STATES OF AMERICA, NORFOLK & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees. } No. 1278.

Petition of the United States of America, appellees in the above stated appeals, numbers 1277 and 1278, which were heard together and disposed of as one cause by the said Circuit Court of Appeals, for an order allowing an appeal from the final decrees heretofore entered in this cause to the Supreme Court of the United States.

The United States of America, appellees, as aforesaid, feeling themselves aggrieved by the final orders and decrees heretofore made and entered by this court in this cause on the 12th day of November, 1915, whereby it was ordered, adjudged, and decreed that the estate of James D. Leary, deceased, represented by Daniel J. Leary and George Leary, administrators, has established
189 a claim to the stock of the Norfolk & Western Railway Company, in controversy in said suit, superior to the claim of the United States thereto, and whereby it was further decreed that the decree of the District Court of the United States for the Western District of Virginia, entered on the 13th day of December, 1913, in the equity cause of the United States, complainant, versus Benjamin D. Greene, Luther Laflin Kellogg, et al., awarding to the United States, free from the claims of all other parties thereto, the 400 shares of Norfolk & Western Railway Company stock and accumulated dividends and profits, be reversed, come now by Marion Erwin, special assistant to the Attorney General, and hereby appeal from

said order and decree of November 12th, 1915, to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings upon which said orders and decrees were made, duly authenticated, together with such original documentary evidence and exhibits as were sent up from the said district court for inspection of the Circuit Court of Appeals, may be sent up, duly authenticated, to the Supreme Court of the United States, and that this court will make and enter a suitable order superseding said decrees of November 12th, 1915, pending this appeal to the Supreme Court.

MARION ERWIN,
Special Assistant to the Attorney General,
Solicitor of Record for the United States.

190 *Assignment of errors. Filed December 10, 1916.*

In the United States Circuit Court of Appeals, Fourth Circuit.

DANIEL J. LEARY AND GEORGE LEARY, administrators of James D. Leary, deceased, appellants,
versus
THE UNITED STATES OF AMERICA AND LUTHER Laflin Kellogg, appellees. } No. 1277.

LUTHER LAFLIN KELLOGG, appellant,
versus
THE UNITED STATES OF AMERICA, NORFOLK & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees. } No. 1278.

Assignment of errors.

Come now the United States of America, appellees in the above-stated proceedings in the said Circuit Court of Appeals, and appellants herein, and file the following assignment of errors upon which the said United States will rely upon their prosecution of the appeal in the above-entitled cause upon their appeal from the decrees made by this honorable court on the 12th day of November, 1915, in the above-entitled cause.

I.

191 That the said United States Circuit Court of Appeals erred in holding and decreeing that the estate of James D. Leary, deceased, represented by said Daniel J. Leary and George Leary, administrators of said James D. Leary, has established a claim to the 400 shares of Norfolk & Western Railway Company stock in controversy, which is superior to the claim of the United States thereto.

II.

That the said Circuit Court of Appeals erred in holding and decreeing that the decree of the District Court of the United States for the Western District of Virginia, entered on the 13th day of December, 1913, whereby it had been decreed that the said 400 shares of Norfolk & Western Railway Company stock, and its dividends and profits, are the property of the United States free from the claims of all other parties to the suit be reversed.

III.

That the said Circuit Court of Appeals erred in failing to affirm the said decree of said district court, awarding the said Norfolk & Western Railway Company stock, and the accumulated dividends and profits to the United States as its property, free from the claims of all parties to said cause.

IV.

That the said Circuit Court of Appeals erred in reversing so much of the said decree of said district court as decreed that the claim of the United States to said 400 shares of Norfolk & Western Railway Company stock and the accumulated dividends and profits was superior to all claims thereto of the said Benjamin D. Greene.

V.

That the said Circuit Court of Appeals erred in reversing
192 so much of the said decree of said district court as decreed that the claim of the United States to said 400 shares of Norfolk & Western Railway Company stock and the dividends and profits was superior to all claims thereto of the said Luther Laflin Kellogg.

VI.

That the said Circuit Court of Appeals erred in reversing so much of the said decree of said District Court as denied any allowance to him from the fund in this cause.

VII.

That the said Circuit Court of Appeals erred in not holding and decreeing that by reason of the averments of the bill of complaint, and the decree pro confesso duly taken against said Benjamin D. Greene, the United States was entitled to a decree awarding to the United States as against said Greene, the ownership of said 400 shares of Norfolk & Western Railway Company stock and its dividends and profits, without the necessity of proofs.

VIII.

That the said Circuit Court of Appeals erred in not holding and decreeing that by reason of the amended answer of said Luther Laflin Kellogg to complainants' bill, in which no right is set up in said Kellogg to the said Norfolk & Western stock other than as a mere custodian or naked trustee for Benjamin D. Greene, and by reason of the decree pro confesso duly taken against said Greene, that the United States was entitled to a decree awarding to the United States as against the said Kellogg the ownership of said 400 shares of Norfolk & Western Railway Company stock and its dividends and profits, without the necessity of proofs.

IX.

That said Circuit Court of Appeals erred in not holding and
193 decreeing that the frauds charged in the bill of complaint, as having been committed by the said Benjamin D. Greene whereby the funds of the United States entrusted by the Government to Oberlin M. Carter, its trusted officer and employee, were fraudulently diverted to the use of the said Benjamin D. Greene, and the investment of the proceeds thereof by the said Luther Laflin Kellogg for said Greene, in the said 400 shares of Norfolk & Western Railway Company stock was fully established by the evidence.

X.

That the said Circuit Court of Appeals erred in not holding that the defendant Luther Laflin Kellogg was shown by the evidence to be on full notice, actual and constructive, at and before the execution of the bond of January 20, 1902, by said James D. Leary that the securities then held by said Kellogg for said Benjamin D. Greene, and particularly said Norfolk & Western Railway Company stock, were purchased with the proceeds of funds of the United States fraudulently diverted to his own use by said Greene.

XI.

That the said Circuit Court of Appeals erred in not holding that James D. Leary was shown by the evidence to be on full constructive notice, at and before the execution of the bond of January 20, 1902, by said James D. Leary that the securities then held by said Benjamin D. Greene, or by said Luther Laflin Kellogg for said Greene, were purchased with the proceeds of funds of the United States fraudulently diverted to his own use by said Greene.

XII.

That the said Circuit Court of Appeals erred in holding and decreeing that the question of notice to the said Luther Laflin Kellogg

and to the said James D. Leary of the rights of the United
194 States in and to the securities held by said Kellogg for said Benjamin D. Greene, is to be determined by the situation on December 14, 1899, when said Leary became surety for Greene on the temporary bail bond for hearing before the commissioner, instead of on January 20, 1902, when the bond of that date was given which refers to the evidence taken before the commissioner, which it is now admitted by stipulation showed the guilt of the said Greene and his fraudulent acquisition of $722,528.03 of the Government funds.

XIII.

The said Circuit Court of Appeals erred in not holding and decreeing that the said Benjamin D. Greene was a necessary party defendant to the intervention filed by the administrator of said James D. Leary, and that said Benjamin D. Greene was neither personally served with process in the district nor personally appeared, and that no order was ever made, published, or served upon said Greene on said intervention or amended intervention of said administrator in accordance with section 8 of the act of 1875 (18th Stat. L., 472), requiring him to appear, plead, answer, or demur to the said suit by a day certain designated therein, and for that reason the said intervenor was entitled to no relief in this cause.

XIV.

That the said Circuit Court of Appeals erred in not holding that by the failure of the said intervenor to make said Benjamin D. Greene a party to the appeal taken from the order of the said District Court of July 20, 1908, which denied leave to file said intervention, said order became final as to said Greene, and the said court never thereafter acquired the necessary jurisdiction over said
Greene to render any relief against the said property on
195 said intervention.

XV.

That the said Circuit Court of Appeals erred in failing to hold and decree that by reason of the failure of the said intervenor to enter any decree pro confesso on the said intervention against the said Benjamin D. Greene, the intervenor was not at the time of the hearing and final decree in said District Court entitled to enforce the equitable contract rights set up through said Greene to the property in question, or entitled to offer any testimony in said cause ex parte as to the said Greene as to said intervention.

XVI.

That the said Circuit Court of Appeals erred in failing to hold and decree that by reason of the failure of the said intervenor to

enter any decree pro confesso on the said intervention against the said Luther Laflin Kellogg, the intervenor was not at the time of the final hearing and decree in said District Court entitled to enforce the equitable contract rights set up through said Greene and Kellogg to the property in question, or entitled to offer any testimony in said cause, ex parte as to said Kellogg as to said intervention.

XVII.

The said Circuit Court of Appeals erred in holding and decreeing that the letter of December 14, 1899, from L. Laflin Kellogg to James D. Leary, created a legal or equitable right in said Leary to some specific 300 shares of Delaware, Lackawanna & Western Railroad Company stock, no specific shares being described or delivered or set apart by said Kellogg, and the evidence shows that Kellogg then held 400 shares of said Delaware, Lackawanna & West-
196 ern stock for Greene.

XVIII.

The said Circuit Court of Appeals erred in not holding and decreeing that the said letter of December 14, 1899, created no legal or equitable right in said Leary to said 300 shares of stock, because it was a promise to pay a particular obligation of said Leary out of a particular fund of 400 shares of stock held by Kellogg for said Greene without any delivery of any said shares to Leary or segregation of the 300 shares, the said Kellogg reserving the right to sell said stocks and undertaking only to apply the proceeds to said obligation.

XIX.

The said Circuit Court of Appeals erred in not holding and decreeing that the said letter of December 14, 1899, can not be construed to have referred to any other liability assumed by said Leary as surety for said Greene than the temporary bail bond for $20,000, signed by said Leary on December 14, 1899, and which was exonerated on February 20, 1900, and the said Lackawanna & Western Railroad Company stock having been sold by said Kellogg on March 23, 1900.

XX.

That said Circuit Court of Appeals erred in not holding that the letter of May 21, 1901, from L. Laflin Kellogg to said James D. Leary, created no legal or equitable right in said Leary to any particular securities of Greene's in Kellogg's hands, because no particular securities are mentioned therein; the Lackawanna & Western stocks were not then held by said Kellogg or by said Greene, and the bail bond for $25,000 then executed was exonerated on June 8, 1901.

197

XXI.

That the said Circuit Court of Appeals erred in not holding that the letter of June 6, 1901, from said Kellogg to said James D. Leary, created no legal or equitable right in said Leary to any particular securities of Greene's in Kellogg's hands, because it does not mention the holding of security and said bond referred to was exonerated.

XXII.

That the said Circuit Court of Appeals erred in not holding that there is no legal or competent evidence whatever in this cause to show that the said Greene or the said Kellogg entered into any agreement or contract by which the said James D. Leary acquired or was intended to acquire any interest, legal or equitable, in any of the securities held by said Kellogg for said Greene, for or in consideration of said Leary having become surety or bail for said Greene on the bond of January 20, 1902, for the appearance of said Greene in Georgia.

XXIII.

That the said Circuit Court of Appeals erred in not holding that even if said James D. Leary had acquired an equitable right as against said Benjamin D. Greene to the said Norfolk & Western Railway Company stock, yet it being established by the evidence that the said stocks had been purchased with money fraudulently acquired by said Greene from the United States, the burden was upon the said intervenor to show that said Leary acquired said equity on January 20, 1902, when the right was acquired, as a bona fide purchaser for value without notice, which burden has not been overcome.

XXIV.

198 That the said Circuit Court of Appeals erred in not holding that, even if said James D. Leary had acquired an equitable right as against said Benjamin D. Greene to the said Norfolk & Western Railway Company stock, yet the Government's equity being the oldest, and the Government being the diligent suitor in tracing and tying up said stock by legal proceedings, has the superior equity in any event.

XXV.

That the said Circuit Court of Appeals erred in holding and decreeing the original answer of Luther Laflin Kellogg, verified March 1, 1904, to the bill of complaint was to be treated on the final hearing on the merits as an affidavit and evidence against the United States,

and in having so treated it, there being no stipulation so to admit it as evidence, and answer under oath having been waived in the bill of complaint.

Wherefore the said United States, appellants herein, prays that the judgments and decrees of the said Circuit Court of Appeals be reversed, and that the decree of said district court be affirmed.

MARION ERWIN,
Special Assistant to the Attorney General,
Solicitor for the United States.

199 *Order allowing appeal. Filed and entered December 10, 1915.*

In the United States Circuit Court of Appeals, Fourth Circuit.
November term, 1915.

Present: The honorable Martin A. Knapp, U. S. circuit judge.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS of James D. Leary, deceased, appellants,
versus
THE UNITED STATES OF AMERICA AND LUTHER Laflin Kellogg, appellees. } No. 1277.

LUTHER, LAFLIN KELLOGG, APPELLANT,
versus
THE UNITED STATES OF AMERICA, NORFOLK & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees. } No. 1278.

On motion of Marion Erwin, Esq., special assistant to the Attorney General, and of counsel for the United States, it is

Ordered that the appeal of the United States to the Supreme Court of the United States from the final decrees heretofore filed and entered herein on the 12th day of November, 1915, be, and the same hereby is, allowed, and that a transcript of the record, papers, and proceedings upon which said orders and decrees were made duly authenticated, together with such original documentary evi-
200 dence and exhibits as were sent up from said district court for inspection of the Circuit Court of Appeals, shall be sent up duly authenticated by the clerk of this court to the Supreme Court of the United States; it is further

Ordered that the operation of said decrees of November 12th, 1915, be suspended and stayed until the determination of said appeal of the United States to the Supreme Court of the United States.

Dated Dec. 10, 1915.

MARTIN A. KNAPP,
U. S. Circuit Judge.

201 *Citation. Issued December 10, 1915.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Daniel J. Leary and George Leary, administrators of James D. Leary, deceased; to Luther Laflin Kellogg; to the Norfolk & Western Railway Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 9th day of January, 1916, pursuant to an appeal filed by the United States of America in the clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit, and duly allowed on the 10th day of December, 1915, in the appeal causes numbered on the docket of and entitled in said Circuit Court of Appeals as No. 1277, Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellants, versus The United States of America and Luther Laflin Kellogg, appellee, and No. 1278, Luther Laflin Kellogg, appellant, versus The United States of America, Norfolk & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees, which were heard and disposed of as one cause in said Circuit Court of Appeals, to show cause if any there be why the decrees rendered against the said United States, as in the order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this tenth day of December, 1915.

MARTIN A. KNAPP,
Circuit Judge.

202 Endorsed:

"Service of the within citation and receipt of a copy thereof admitted for Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, this December 16th, 1915.

J. T. COLEMAN,
AUBREY E. STRODE,
Solicitors of Record for said Daniel J. Leary and George Leary, administrators as aforesaid."

"Service of the within citation and receipt of a copy thereof admitted for Luther Laflin Kellogg, this December 20th, 1915.

ABRAM J. ROSE,
Solicitor of Record for L. Laflin Kellogg."

"Service of the within citation and receipt of a copy thereof admitted for the Norfolk & Western Railway Company, this December 21st, 1915.

THEODORE W. REATH,
Solicitor of Record for Norfolk & Western Railway Company."

203 *Petition for appeal. Filed January 21, 1916.*

In the United States Circuit Court of Appeals, Fourth Circuit.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS of James D. Leary, deceased, appellant,
versus
THE UNITED STATES OF AMERICA AND LUTHER Laflin Kellogg, appellees. } No. 1277.

Petition of the United States of America, appellee in the above-stated appeal, Number 1277, for an order allowing an appeal from the final decree heretofore entered in this case to the Supreme Court of the United States.

The United States of America, appellees, as aforesaid, feeling themselves aggrieved by the final order and decree heretofore made and entered by this court in this cause on the 12th day of November, 1915, whereby it was ordered, adjudged, and decreed that the estate of James D. Leary, deceased, represented by Daniel J. Leary and George Leary, administrators, has established a claim to the stock of the Norfolk & Western Railway Company in controversy in said suit, superior to the claim of the United States thereto, and whereby it was further decreed that the decree of the District Court of the United States for the Western District of Virginia, entered on the 13th day of December, 1913, in the equity cause of the
204 United States, complainant, versus Benjamin D. Greene, Luther Laflin Kellogg, et al., awarding to the United States, free from the claims of all other parties thereto, the 400 shares of Norfolk & Western Railway Company stock and accumulated dividends and profits, be reversed, comes now by Marion Erwin, special assistant to the Attorney General, and hereby appeals from said order and decree of November 12th, 1915, to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed and that a transcript of the record, papers, and proceedings upon which said order and decree was made, duly authenticated, together with such original documentary evidence and exhibits as were sent up from the said district court for inspection of the circuit court of appeals, may be sent up, duly authenticated, to the Supreme Court of the United States, and that this court will make and enter a

suitable order superseding said decree of November 12th, 1915, pending this appeal to the Supreme Court.

By direction of the Attorney General.

MARION ERWIN,
Special Assistant to the Attorney General,
Solicitor of Record for the United States.

205 *Assignments of error. Filed January 21, 1916.*

In the United States Circuit Court of Appeals, Fourth Circuit.

DANIEL J. LEARY AND GEORGE LEARY, administrators of James D. Leary, deceased, appellants,
versus
THE UNITED STATES OF AMERICA AND LUTHER Laflin Kellogg, appellees.
} No. 1277.

Assignment of errors.

Comes now the United States of America, appellees in the above stated proceedings in the said Circuit Court of Appeals, and appellants herein, and file the following assignment of errors upon which the said United States will rely upon their prosecution of the appeal in the above-entitled cause upon their appeal from the decree made by this honorable court on the 12th day of November, 1915, in the above-entitled cause.

I.

That the said United States Circuit Court of Appeals erred in holding and decreeing that the estates of James D. Leary, deceased, represented by said Daniel J. Leary and George Leary, administrators of said James D. Leary, has established a claim to the 400 shares of Norfolk & Western Railway Company stock in controversy, which is superior to the claim of the United States thereto.

206 II.

That the said Circuit Court of Appeals erred in holding and decreeing that the decree of the District Court of the United States for the Western District of Virginia entered on the 13th day of December, 1913, whereby it had been decreed that the said 400 shares of Norfolk & Western Railway Company stock, and its dividends and profits, are the property of the United States free from the claims of all other parties to the suit be reversed.

III.

That the said Circuit Court of Appeals erred in failing to affirm the said decree of said district court, awarding the said Norfolk &

Western Railway Company stock, and the accumulated dividends and profits, to the United States as its property, free from the claims of all other parties to said cause.

IV.

That the said Circuit Court of Appeals erred in reversing so much of the said decree of said district court as decreed that the claim of the United States to said 400 shares of Norfolk & Western Railway Company stock, and the accumulated dividends and profits, was superior to all claims thereto of the said Benjamin D. Greene.

V.

That the said Circuit Court of Appeals erred in reversing so much of said decree of said district court as decreed that the claim of the United States to said 400 shares of Norfolk & Western Railway Company stock, and the dividends and profits, was superior to all claims thereto of the said Luther Laflin Kellogg.

207 VI.

That the said Circuit Court of Appeals erred in reversing so much of the said decree of said District Court as denied any allowance to him from the funds in this cause.

VII.

That the said Circuit Court of Appeals erred in not holding and decreeing that by reason of the averments of the bill and complaint, and the decree pro confesso duly taken against said Benjamin D. Greene, the United States was entitled to a decree awarding to the United States as against said Greene, the ownership of said 400 shares of Norfolk & Western Railway Company stock and its dividends and profits, without the necessity of proofs.

VIII.

That the said United States Circuit Court of Appeals erred in not holding and decreeing that by reason of the amended answer of said Luther Laflin Kellogg to complainants' bill, in which no right is set up in said Kellogg to the said Norfolk & Western stock other than as a mere custodian or naked trustee for Benjamin D. Greene, and by reason of the decree pro confesso duly taken against said Greene, that the United States was entitled to a decree awarding to the United States as against the said Kellogg, the ownership of said 400 shares of Norfolk & Western Railway Company stock and its dividends and profits, without the necessity of proofs.

IX.

That said Circuit Court of Appeals erred in not holding and decreeing that the frauds charged in the bill of complaint as having been committed by the said Benjamin D. Greene, whereby the funds of the United States entrusted by the Government to Oberlin M. Carter, its trusted officer and employee, were fraudulently di-
208 verted to the use of the *the* said Benjamin D. Greene and the investment of the proceeds thereof by the said Luther Laflin Kellogg for said Greene, in the said 400 shares of Norfolk & Western Railway Company stock, was fully established by the evidence.

X.

That the said Circuit Court of Appeals erred in not holding that the defendant, Luther Laflin Kellogg, was shown by the evidence to be on full notice, actual and constructive, at and before the execution of the bond of January 20, 1902, by said James D. Leary, and that the securities then held by said Kellogg for said Benjamin D. Greene, and particularly said Norfolk & Western Railway Company stock, were purchased with the proceeds of funds of the United States fraudulently diverted to his own use by said Greene.

XI.

That the said Circuit Court of Appeals erred in not holding that James D. Leary was shown by the evidence to be on full constructive notice, at and before the execution of the bond of January 20, 1902, by said James D. Leary that the securities then held by said Benjamin D. Greene or by said Luther Laflin Kellogg for said Greene, were purchased with the proceeds of funds of the United States fraudulently diverted to his own use by said Greene.

XII.

That the said Circuit Court of Appeals erred in holding and decreeing that the question of notice to the said Luther Laflin Kellogg and to the said James D. Leary of the rights of the United States in and to the securities held by said Kellogg for said Benjamin D. Greene, is to be determined by the situation on December 14, 1899, when said Leary became surety for Greene on the tem-
209 porary bail bond for hearing before the commissioner, instead of an January 20, 1902, when the bond of that date was given which refers to the evidence taken before the commissioner which it is now admitted by stipulation showed the guilt of the said Greene and his fraudulent acquisition of $722,528.03 of the Government funds.

XIII.

That said Circuit Court of Appeals erred in not holding and decreeing that the said Benjamin D. Greene was a necessary party de-

fendant to the intervention filed by the administrator of said James D. Leary, and that said Benjamin D. Greene was neither personally served with process in the district nor personally appeared, and that no order was ever made, published, or served upon said Greene on said intervention or amended intervention of said administrator, in accordance with section 8 of the act of 1876 (18th Stat. L., 472) requring him to appear, plead, answer, or demur to the said suit by a day certain designated therein, and for that reason the said intervenor was entitled to no relief in this cause.

XIV.

That the said Circuit Court of Appeals erred in not holding that the failure of the said intervenor to make said Benjamin D. Greene a party to the appeal taken from the order of the said District Court of July 20, 1908, which denied leave to file said intervention, said order became final as to said Greene, and the said court never thereafter acquired the necessary jurisdiction over said Greene to render any relief against the said property on said intervention.

210 XV.

That the said Circuit Court of Appeals erred in failing to hold and decree that by reason of the failure of the said intervenor to enter any decree pro confesso on the said intervention against the said Benjamin D. Greene, the intervenor was not at the time of the hearing and final decree in said District Court entitled to enforce the equitable contract rights set up through said Greene to the property in question, or entitled to offer any testimony in said cause ex parte as to the said Greene as to said intervention.

XVI.

That the said Circuit Court of Appeals erred in failing to hold and decree that by reason of the failure of the said intervenor to enter any decree pro confesso on the said intervention against the said Luther Laflin Kellogg, the intervenor was not at the time of the final hearing and decree in said District Court entitled to enforce the equitable contract rights set up through said Greene and Kellogg to the property in question, or entitled to offer any testimony in said cause ex parte as to said Kellogg as to said intervention.

XVII.

The said Circuit Court of Appeals erred in holding and decreeing that the letter of December 14, 1899, from L. Laflin Kellogg to James D. Leary created a legal or equitable right in said Leary to some specific 300 shares of Delaware, Lackawanna & Western Railroad Company stock, no specific shares being described or delivered or set

apart by said Kellogg, and the evidence shows that Kellogg then held 400 shares of said Delaware, Lackawanna & Western stock for Greene.

211 XVIII.

The said Circuit Court of Appeals erred in not holding and decreeing that the said letter of December 14, 1899, created no legal or equitable right in said Leary to said 300 shares of stock, because it was a promise to pay a particular obligation of said Leary out of a particular fund of 400 shares of stock held by Kellogg for said Greene, without any delivery of any said shares to Leary or segregatiton of tht 300 shares, the said Kellogg reserving the right to sell said stocks and undertaking only to apply the proceeds to said obligation.

XIX.

The said Circuit Court of Appeals erred in not holding and decreeing that the said letter of December 14, 1899, cannot be construed to have referred to any other liability assumed by said Leary as surety for said Greene than the temporary bail bond for $20,000 signed by said Leary on December 14, 1899, and which was exonerated on February 20, 1900, and the said Lackawanna & Western Railroad Company stock having been sold by said Kellogg on March 23, 1900.

XX.

That said Circuit Court of Appeals erred in not holding that the letter of May 21, 1901, from L. Laflin Kellogg to said James D. Leary, created no legal or equitable right in said Leary to any particular securities of Greene's in Kellogg's hands, because no particular securities are mentioned therein; the Lackawanna & Western stocks were not then held by said Kellogg or by said Greene, and the bail bond for $25,000 then executed was exonerated on June 8, 1901.

212 XXI.

That the said Circuit Court of Appeals erred in not holding that the letter of June 6, 1901, from said Kellogg to said James D. Leary, created no legal or equitable right in said Leary to any particular securities of Greene's in Kellogg's hands, because it does not mention the holding of security, and said bond referred to was exonerated.

XXII.

That the said Circuit Court of Appeals erred in not holding that there is no legal or competent evidence whatever in this cause to

show that the said Greene or the said Kellogg entered into any agreement or contract by which the said James D. Leary acquired or was intended to acquire any interest, legal or equitable, in any of the securities held by said Kellogg for said Greene for or in consideration of said Leary having become surety or bail for said Greene on the bond of January 20, 1902, for the appearance of said Greene in Georgia.

XXIII.

That the said Circuit Court of Appeals erred in not holding that, even if said James D. Leary had acquired no equitable right as against said Benjamin D. Greene to the said Norfolk & Western Railway Company stock, yet it being established by the evidence that the said stocks had been purchased with money fraudulently acquired by said Greene from the United States, the burden was upon the said intervenor to show that said Leary acquired said equity on January 20, 1902, when the right was acquired, as a bona fide purchaser for value without notice, which burden has not been overcome.

213 XXIV.

That the said Circuit Court of Appeals erred in not holding that even if said James D. Leary had acquired an equitable right as against said Benjamin D. Greene to the said Norfolk & Western Railway Company stock, yet the Government's equity being the oldest, and the Government being the diligent suitor in tracing and tying up said stock by legal proceedings, has the superior equity in any event.

XXV.

That the said Circuit Court of Appeals erred in holding and decreeing the original answer of Luther Laflin Kellogg, verified March 1, 1904, to the bill of complaint, was to be treated on the final hearing on the merits as an affidavit and evidence against the United States, and in having so treated it there being no stipulation so as to admit it as evidence, and answer under oath having been waived in the bill of complaint.

Wherefore the said United States, appellants herein, pray that the judgment and decree of the said Circuit Court of Appeals be reversed and that the decree of said District Court be affirmed.

Dated this January 21, 1916.

MARION ERWIN,
Special Assistant to the Attorney General,
Solicitor for the United States.

214 *Order allowing appeal January 21, 1916.*

In the United States Circuit Court of Appeals, Fourth Circuit. November term, 1915.

Present: The honorable Martin A. Knapp, U. S. circuit judge.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS of James D. Leary, deceased, appellants,
versus
THE UNITED STATES OF AMERICA AND LUTHER LAFLIN Kellogg, appellees. } No. 1277.

On motion of Marion Erwin, Esq., special assistant to the Attorney General, and of counsel for the United States, made by direction of the Attorney General, it is

Ordered that the appeal of the United States to the Supreme Court of the United States from the final decree heretofore filed and entered herein on the 12th day of November, 1915, be, and the same hereby is, allowed, and that a transcript of the record, papers, and proceedings upon which said order and decree was made duly authenticated, together with such original documentary evidence and exhibits as were sent up from the District Court for inspection of the Circuit Court of Appeals, shall be sent up duly authenticated by the clerk of this court to the Supreme Court of the United States; and it is further

215 Ordered, that the operation of said decree of November 12th, 1915, be suspended and stayed until the determination of said appeal of the United States to the Supreme Court of the United States.

January 21st, 1916.

MARTIN A. KNAPP,
U. S. Circuit Judge.

216 *Citation issued January 21, 1916.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Daniel J. Leary and George Leary, administrators of James D. Leary, deceased; to Luther Laflin Kellogg; to the Norfolk & Western Railway Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 9th day of February, 1916, pursuant to an appeal filed by the United States of America in the clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit, and duly allowed on the 21st day of January, 1916, from decree entered on the 12th day of November, 1915, in

the appeal cause numbered on the docket of and entitled in said Circuit Court of Appeals as No. 1277, Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellants, versus the United States of America, and Luther Laflin Kellogg, appellees, to show cause, if any there be, why the decree rendered against the said United States, as in the order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 21 day of January, 1916.

MARTIN A. KNAPP,
Circuit Judge.

217 Service of the within citation and receipt of a copy thereof admitted for Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, this 1st day of February, 1916.

J. T. COLEMAN,
Solicitor of record for said Daniel J. Leary and George Leary, adminstrators, as aforesaid.

Service of the within citation and receipt of a copy thereof admitted for Luther Laflin Kellogg, this 2nd day of Feb'y, 1916.

ABRAM J. ROSE,
Solicitor of Record for L. Laflin Kellogg.

Service of the within citation and receipt of a copy thereof admitted for the Norfolk & Western Railway Company, this 3rd day of February, 1916.

THEODORE W. REATH,
Solicitor of Record for Norway & Western Railway Company.

218 *Petition for appeal. Filed January 21, 1916.*

In the United States Circuit Court of Appeals, Fourth Circuit.

LUTHER LAFLIN KELLOGG, APPELLANT, *versus* THE UNITED STATES OF AMERICA, NORFOLK & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees.	No. 1278.

Petition of the United States of America, appellee in the above stated appeal, Number 1278, for an order allowing an appeal from the final decree heretofore entered in this cause to the Supreme Court of the United States.

The United States of America, appellees, as aforesaid, feeling themselves aggrieved by the final order and decree heretofore made

and entered by this court in this cause on the 12th day of November, 1915, whereby it was ordered, adjudged, and decreed that the estate of James D. Leary, deceased, represented by Daniel J. Leary and George Leary, administrators, has established a claim to the stock of the Norfolk & Western Railway Company in controversy in said suit superior to the claim of the United States thereto, and whereby it was further decreed that the decree of the District Court of the United States for the Western District of Virginia, entered on the 13th day of December, 1913, in the equity cause of the
219 United States, complainant, versus Benjamin D. Greene, Luther Laflin Kellogg, et al., awarding to the United States, free from the claims of all other parties thereto, the 400 shares of Norfolk & Western Railway Company stock, and accumulated dividends and profits, be reversed, comes now by Marion Erwin, special assistant to the Attorney General, and hereby appeals from said order and decree of November 12th, 1915, to the Supreme Court of the United States for the reason specified in the assignment of errors filed herein, and it prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings upon which said order and decree was made duly authenticated, together with such original documentary evidence and exhibits as were sent up from the said district court for inspection of the Circuit Court of Appeals, may be sent up duly authenticated to the Supreme Court of the United States, and that this court will make and enter a suitable order superseding said decree of November 12th, 1915, pending this appeal to the Supreme Court.

By direction of the Attorney General.

MARION ERWIN,
Special Assistant to the Attorney General,
Solicitor of Record for the United States.

220 *Assignments of error. Filed January 21st, 1916.*

In the United States Circuit Court of Appeals, Fourth Circuit.

LUTHER LAFLIN KELLOGG, APPELLANT, *versus* THE UNITED STATES OF AMERICA, NORFOLK & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees.	No. 1278.

Assignment of errors.

Comes now the United States of America, appellees in the above stated proceedings in the said Circuit Court of Appeals, and appellants herein, and file the following assignment of errors, upon which the said United States will rely upon their prosecution of the appeal

in the above entitled cause upon their appeal from the decree made by this honorable court on the 12th day of November, 1915, in the above entitled cause.

I.

That the said United States Circuit Court of Appeals erred in holding and decreeing that the estate of James D. Leary, deceased, represented by said Daniel J. Leary and George Leary, administrators of said James D. Leary, has established a claim to the 400 shares of Norfolk & Western Railway Company stock in controversy which is superior to the claim of the United States thereto.

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II.

That the said Circuit Court of Appeals erred in holding and decreeing that the decree of the District Court of the United States for the Western District of Virginia, entered on the 13th day of December, 1913, whereby it had been decreed that the said 400 shares of Norfolk & Western Railway Company stock, and its dividends and profits, are the property of the United States free from the claims of all other parties to the suit be reversed.

III.

That the said Circuit Court of Appeals erred in failing to affirm the said decree of said district court awarding the said Norfolk & Western Railway Company stock, and the accumulated dividends and profits, to the United States as its property, free from the claims of all other parties to said cause.

IV.

That the said Circuit Court of Appeals erred in reversing so much of the said decree of said district court as decreed that the claim of the United States to said 400 shares of Norfolk & Western Railway Company stock, and the accumulated dividends and profits, was superior to all claims thereto of the said Benjamin D. Greene.

V.

That the said Circuit Court of Appeals erred in reversing so much of the said decree of said district court as decreed that the claim of the United States to said 400 shares of Norfolk & Western Railway Company stock, and the dividends and profits, was superior to all claims thereto of the said Luther Laflin Kellogg.

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VI.

That the said Circuit Court of Appeals erred in reversing so much of the said decree of said district court as denied any allowance to him from the fund in this cause.

VII.

That the said Circuit Court of Appeals erred in not holding and decreeing that, by reason of the averments of the bill of complaint and the decree pro confesso duly taken against said Benjamin D. Greene, the United States was entitled to a decree awarding to the United States as against said Greene, the ownership of said 400 shares of Norfolk & Western Railway Company stock and its dividends and profits, without the necessity of proofs.

VIII.

That the said Circuit Court of Appeals erred in holding and decreeing that, by reason of the amended answer of said Luther Laflin Kellogg to complainants' bill, in which no right is set up in said Kellogg to the said Norfolk & Western stock other than as a mere custodian or naked trustee for Benjamin D. Greene, and by reason of the decree pro confesso duly taken against said Greene, that the United States was entitled to a decree awarding to the United States as against the said Kellogg the ownership of said 400 shares of Norfolk & Western Railway Company stock and its dividends and profits, without the necessity of proofs.

IX.

That the said Circuit Court of Appeals erred in not holding and decreeing that the frauds charged in the bill of complaint as having been committed by the said Benjamin D. Greene, whereby the funds of the United States entrusted by the Government to Oberlin M. Carter, its trusted officer and employee, were fraudulently
223 diverted to the use of the said Benjamin D. Greene, and the investment of the proceeds thereof by the said Luther Laflin Kellogg for said Greene in the said 400 shares of Norfolk & Western Railway Company stock, was fully established by the evidence.

X.

That the said Circuit Court of Appeals erred in not holding that the defendant, Luther Laflin Kellogg, was shown by the evidence to be on full notice, actual and constructive, at and before the execution of the bond of January 20, 1902, by said James D. Leary, that the securities then held by said Kellogg for said Benjamin D. Greene, and particularly said Norfolk & Western Railway Company stock, were purchased with the proceeds of funds of the United States fraudulently diverted to his own use by said Greene.

XI.

That the said Circuit Court of Appeals erred in not holding that James D. Leary was shown by the evidence to be on full construc-

tive notice, at and before the execution of the bond of January 20, 1902, by said James D. Leary, that the securities then held by said Benjamin D. Greene or by said Luther Laflin Kellogg for said Greene, were purchased with the proceeds of the funds of the United States fraudulently diverted to his own use by said Greene.

XII.

That the said Circuit Court of Appeals erred in holding and decreeing that the question of notice to the said Luther Laflin Kellogg and to the said James D. Leary of the rights of the United States in and to the securities held by said Kellogg for said Benjamin D. Greene, is to be determined by the situation on December 14, 1899,
224 when said Leary became surety for Greene on the temporary bail bond for hearing before the commissioner, instead of on January 20, 1902, when the bond of that date was given which refers to the evidence taken before the commissioner, which it is now admitted by stipulation showed the guilt of the said Greene and his fraudulent acquisition of $722,528.03 of the Government funds.

XIII.

That said Circuit Court of Appeals erred in not holding and decreeing that the said Benjamin D. Greene was a necessary party defendant to the intervention filed by the administrator of said James D. Leary, and that said Benjamin D. Greene was neither personally served with process in the district nor personally appeared, and that no order was ever made, published, or served upon said Greene on said intervention or amended intervention of said administrator in accordance with section 8 of the act of 1875 (18th Stat. L., 472), requiring him to appear, plead, answer, or demur to the said suit by a day certain designated therein, and for that reason the said intervenor was entitled to no relief in this cause.

XIV.

That the said Circuit Court of Appeals erred in not holding that the failure of the said intervenor to make said Benjamin D. Greene a party to the appeal taken from the order of the said District Court of July 20, 1908, which denied leave to file said intervention, said order became final as to said Greene, and the said court never thereafter acquired the necessary jurisdiction over said Greene to render any relief against the said property on said intervention.

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XV.

That the said Circuit Court of Appeals erred in failing to hold and decree that by reason of the failure of the said intervenor to enter any decree pro confesso on the said intervention against the

said Benjamin D. Greene, the intervenor was not at the time of the hearing and final decree in said District Court entitled to enforce the equitable contract rights set up through said Greene to the property in question, or entitled to offer any testimony in said cause ex parte as to the said Greene as to said intervention.

XVI.

That the said Circuit Court of Appeals erred in failing to hold and decree that by reason of the failure of the said intervenor to enter any decree pro confesso on the said intervention against the said Luther Laflin Kellogg, the intervenor was not at the time of the final hearing and decree in said District Court entitled to enforce the equitable contract rights set up through said Greene and Kellogg to the property in question, or entitled to offer any testimony in said cause, ex parte as to said Kellogg as to said intervention.

XVII.

That said Circuit Court of Appeals erred in holding and decreeing that the letter of December 14, 1899, from L. Laflin Kellogg to James D. Leary created a legal or equitable right in said Leary to some specific 300 shares of Delaware, Lackawanna & Western Railroad Company stock, no specific shares being described or delivered or set apart by said Kellogg, and the evidence shows that Kellogg then held 400 shares of said Delaware, Lackawanna & Western stock for Greene.

226 XVIII.

That said Circuit Court of Appeals erred in not holding and decreeing that the said letter of December 14, 1899, created no legal or equitable right in said Leary to said 300 shares of stock, because it was a promise to pay a particular obligation of said Leary out of a particular fund of 400 shares of stock held by Kellogg for said Greene without any delivery of any said shares to Leary for segregation of the 300 shares, the said Kellogg reserving the right to sell said stocks and undertaking only to apply the proceeds to said obligation.

XIX.

The said Circuit Court of Appeals erred in not holding and decreeing that the said letter of December 14, 1899, can not be construed to have referred to any other liability assumed by said Leary as surety for said Greene than the temporary bail bond for $20,000 signed by said Leary on December 14, 1899, and which was exonerated on February 20, 1900, and the said Lackawanna & Western Railroad Company stock having been sold by said Kellogg on March 23, 1900.

XX.

That said Circuit Court of Appeals erred in not holding that the letter of May 21, 1901, from L. Laflin Kellogg to said James D. Leary, created no legal or equitable right in said Leary to any particular securities of Greene's in Kellogg's hands, because no particular securities are mentioned therein, the Lackawanna & Western stocks were not then held by said Kellogg or by said Greene, and the bail bond for $25,000 then executed was exonerated on June 8, 1901.

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XXI.

That the said Circuit Court of Appeals erred in not holding that the letter of June 6, 1901, from said Kellogg to said James D. Leary created no legal or equitable right in said Leary to any particular securities of Greene's in Kellogg's hands, because it does not mention the holding of security, and said bond referred to was exonerated.

XXII.

That the said Circuit Court of Appeals erred in not holding that there is no legal or competent evidence whatever in this cause to show that the said Greene or the said Kellogg entered into any agreement or contract by which the said James D. Leary acquired or was intended to acquire any interest, legal or equitable, in any of the securities held by said Kellogg for said Greene for or in consideration of said Leary having become surety or bail for said Greene on the bond of January 20, 1902, for the appearance of said Greene in Georgia.

XXIII.

That the said Circuit Court of Appeals erred in not holding that even if said James D. Leary had acquired an equitable right as against said Benjamin D. Greene to the said Norfolk & Western Railway Company stock, yet it being established by the evidence that the said stocks had been purchased with money fraudulently acquired by said Greene from the United States, the burden was upon the said intervenor to show that said Leary acquired said equity on January 20, 1902, when the right was acquired as a bona fide purchaser for value without notice, which burden has not been overcome.

XXIV.

228 That the said Circuit Court of Appeals erred in not holding that even if said James D. Leary had acquired an equitable right as against said Benjamin D. Greene to the said Norfolk & Western Railway Company stock, yet the Government's equity being the oldest, and the Government being the diligent suitor in tracing and tying up said stock by legal proceedings, has the superior equity in any event.

XXV.

That the said Circuit Court of Appeals erred in holding and decreeing the original answer of Luther Laflin Kellogg, verified March 1, 1904, to the bill of complaint, was to be treated on the final hearing on the merits as an affidavit and evidence against the United States, and in having so treated it, there was no stipulation so as to admit it as evidence, and answer under oath having been waived in the bill of complaint.

Wherefore the said United States, appellants herein, pray that the judgment and decree of the said Circuit Court of Appeals be reversed, and that the decree of the said District Court be affirmed.

Dated this January 21, 1916.

MARION ERWIN,
Special Assistant to the Attorney General,
Solicitor for the United States.

229 *Order allowing appeal January 21, 1916.*

In the United States Circuit Court of Appeals, Fourth Circuit.
November term, 1915.

Present: The Honorable Martin A. Knapp, U. S. Circuit Judge.

LUTHER LAFLIN KELLOGG, APPELLANT,
versus
THE UNITED STATES OF AMERICA, NORFOLK & WESTERN Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees. } No. 1278.

On motion of Marion Erwin, Esq., special assistant to the Attorney General, and of counsel for the United States, made by direction of the Attorney General, it is

Ordered, that the appeal of the United States to the Supreme Court of the United States from the final decree heretofore filed and entered herein on the 12th day of November, 1915, be and the same hereby is, allowed, and that a transcript of the record, papers, and proceedings upon which said order and decree was made duly authenticated, together with such original documentary evidence and exhibits as were sent up from said District Court for inspection of the Circuit Court of Appeals, shall be sent up duly authenticated by the clerk of this court to the Supreme Court of the United States; and it is further

230 Ordered, that the operation of said decree of November 12th, 1915, be suspended and stayed until the determination of said appeal of the United States to the Supreme Court of the United States.

January 21st, 1916.

MARTIN A. KNAPP,
U. S. Circuit Judge.

231 *Citation issued January 21, 1916.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Luther Laflin Kellogg; to Daniel J. Leary and George Leary, administrators of James D. Leary, deceased; to the Norfolk & Western Railway Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 19th day of February, 1916, pursuant to an appeal filed by the United States of America in the clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit, and duly allowed on the 21st day of January, 1916, from decree entered on the 12th day of November, 1915, in the appeal cause numbered on the docket of and entitled in said Circuit Court of Appeals as No. 1278, Luther Laflin Kellogg, appellant, versus The United States of America, Norfolk & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees, to show cause, if any there be, why the decree rendered against the said United States, as in the order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 21 day of January, 1916.

MARTIN A. KNAPP,
Circuit Judge.

232 Service of the within citation and receipt of a copy thereof admitted for Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, this 1st day of February, 1916.

J. T. COLEMAN,
Solicitor of Record for said Daniel J. Leary and George Leary, Administrators as aforesaid.

Service of the within citation and receipt of a copy thereof admitted for Luther Laflin Kellogg this 2 day of Feby., 1916.

ABRAM J. ROSE,
Solicitor of Record for L. Laflin Kellogg.

Service of the within citation and receipt of a copy thereof admitted for the Norfolk & Western Railway Company this 3rd day of February, 1916.

THEODORE W. REATH,
Solicitor of Record for Norfolk & Western Railway Company.

233 *Order extending time to file transcript of records on appeals to the Supreme Court.*

In the matter of the appeals of the United States to the Supreme Court of the United States, allowed December 10, 1915, and February 21, 1916, from the decree of the United States Circuit Court of Appeals for the 4th Circuit, on November 12th, 1915, in appeal causes therein numbered and entitled on the dockets of said Circuit Court of Appeals:

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS, appellants,
vs.
UNITED STATES OF AMERICA AND LUTHER LAFLIN Kellogg, appellees; } No. 1277.

and

LUTHER LAFLIN KELLOGG, APPELLANT,
vs.
UNITED STATES OF AMERICA, AND DANIEL J. LEARY and George Leary, administrators, and Norfolk & Western Railway Co., appellants. } No. 1278.

On motion of United States,

It is ordered that the time within which the transcript of the record on the above stated appeals of the United States may be filed in the Supreme Court of the United States is extended for 30 days from this date.

This 16th day of February, 1916.

MARTIN A. KNAPP,
Circuit Judge.

234 *Order extending time to file transcript of records on appeals to the Supreme Court.*

In the matter of the appeals of the United States to the Supreme Court of the United States, allowed December 10th, 1915, and February 21st, 1916, from the decree of the United States Circuit Court of Appeals for the Fourth Circuit, on November 12th, 1915, in appeal causes therein numbered and entitled on the dockets of said Circuit Court of Appeals:

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS, appellants,
vs.
UNITED STATES OF AMERICA AND LUTHER LAFLIN Kellogg, appellees; } No. 1277.

and

LUTHER LAFLIN KELLOGG, APPELLANT, *vs.* UNITED STATES OF AMERICA, AND DANIEL J. LEARY and George Leary, administrators, and Norfolk & Western Railway Co., appellants.	No. 1278.

On motion of United States,

It is ordered by the court that the time within which the transcript of the record on the above stated appeals of the United States may be filed in the Supreme Court of the United States is further extended for thirty (30) days from March 17th, 1916.

Dated this 11th day of March, 1916.

MARTIN A. KNAPP,
Circuit Judge.

235 *Order extending time to file transcript of records on appeals to the Supreme Court.*

In the matter of the appeals of the United States to the Supreme Court of the United States, allowed December 10th, 1915, and February 21st, 1916, from the decree of the United States Circuit Court of Appeals for the Fourth Circuit, on November 12th, 1915, in appeal causes therein numbered and entitled on the dockets of said Circuit Court of Appeals:

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS, appellants, *vs.* UNITED STATES OF AMERICA AND LUTHER LAFLIN Kellogg, appellees;	No. 1277.

and

LUTHER LAFLIN KELLOGG, APPELLANT, *vs.* UNITED STATES OF AMERICA AND DANIEL J. LEARY AND George Leary, administrators, and Norfolk & Western Railway Co., appellants.	No. 1278.

On motion of United States.

It is ordered by the court that the time within which the transcript of the record on the above stated appeals of the United States may be filed in the Supreme Court of the United States is further extended for sixty (60) days from April 17th, 1916, to wit, June 16th, 1916.

Dated April 17th, 1916.

MARTIN A. KNAPP,
Circuit Judge.

236 *Appellant's praecipe for record. Filed Dec. 24, 1915.*

In the United States Circuit Court of Appeals, Fourth Circuit. Appeal to the Supreme Court of the United States from decrees of Circuit Court of Appeals of Fourth Circuit, allowed December 10, 1915, in appeal causes 1277 and 1278.

UNITED STATES OF AMERICA, APPELLANTS,
versus
DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS of James D. Leary, deceased, Luther Laflin Kellogg, and Norfolk & Western Railway Company, appellees.

Praecipe for record.

To the clerk of the Circuit Court of Appeals, Fourth Circuit:

You will please embody in the record to be certified by you to the Supreme Court the following:

(1) All that is embraced in the printed record, pages 1 to 96, inclusive, of the record which was certified by the clerk of the District Court on April 22, 1914.

(2) So much as is embraced in the printed record of the first appeal of Mary C. Leary, which was made a part of the second appeal record by stipulation of the parties set out, commencing at page 2 of the printed record of the second appeal, and specified in clauses "(a)" to "(1)," inclusive, and which, as I understand it, includes only so much of the matter in the printed record of the first appeal as is embraced from page 1 to 70, inclusive, down to the entry of the filing on July 20, 1908, of Judge McDowell's opinion.

(3) You will also send up, suitably verified by you, all the original documents sent up to the Circuit Court of Appeals which
237 were verified and sent up for inspection of the United States Circuit Court of Appeals from the District Court, with the appeal record certified by the clerk of the District Court on April 22, 1914.

(4) You will also send up, suitably verified, the bonds on appeals and other papers sent up to the Circuit Court of Appeals, which under the rules of the latter were so sent up, outside of the formal record.

(5) You will send up the original citation, with acknowledgments of service endorsed thereon, on the present appeal.

You will see that the above embraces the entire record on which the case was by stipulation tried in the Court of Appeals.

Dated this 23rd day of December, 1915.

Very respectfully,

MARION ERWIN,
Special Assistant to the Attorney General,
Solicitor of Record for the United States.

238 *Appellants' amended præcipe for record. Filed June 10th, 1916.*

In the United States Circuit Court of Appeals, Fourth District. Three appeals of the United States Supreme Court from decrees of Nov. 12, 1915, of U. S. Circuit Court of Appeals entered in appeal cases docketed in said court as 1277 and 1278.

In the matter of
UNITED STATES OF AMERICA, APPELLANTS,
versus
DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS of James D. Leary, deceased; Luther Laflin Kellogg and Norfolk & Western Railway Company, appellees.

To the clerk of the said circuit court of appeals:

In view of the fact that since the taking and allowance, on December 10, 1915, of the appeal of the United States to the Supreme Court, entitled under both cases, docket numbers 1277 and 1278, from the decree of November 12, 1915, entered on your record twice, once under title 1277 and again under title 1278, that by the direction of the Attorney General there was taken by and allowed to the United States on January 21, 1915, a separate appeal from said decree entered under case docket number 1277 and a separate appeal from the said decree entered under case docket number 1278, it will be necessary for you to send up to the Supreme Court a transcript of the papers showing these proceedings, in addition to the papers referred to in my præcipe of Dec. 23, 1915, so that the transcript proper will be extended to embrace all the proceedings had in the Circuit Court of Appeals, including the petition for appeal, assignments of error, order allowing appeal on each of the three appeals. One transcript will be sufficient.

Very respectfully,

MARION ERWIN,
Special Asst. to Attorney General,
Solicitor of Record for United States.

239 *Clerk's certificate.*

I, Henry T. Meloney, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do hereby certify that the foregoing writing annexed to this certificate is a true transcript of the records and proceedings in the appeal causes numbered and entitled on the docket of said court as No. 1277, Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellants, versus The United States of America and Luther Laflin Kellogg, appellees, and No. 1278, Luther Laflin Kellogg, appellant, versus The United

States of America, Norfolk & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees, lately pending in said court, in which decrees were entered in said court on November 12, 1915, from which decrees one appeal entitled under both said docket numbers 1277 and 1278 was taken by the United States and allowed to the Supreme Court of the United States on December 10th, 1915, and from said decree entered under docket number 1277, an appeal was taken by the United States and allowed to the Supreme Court of the United States on January 21st, 1916, and from said decree entered under docket number 1278 an appeal was taken by the United States and allowed to the Supreme Court of the United States January 21st, 1916, made up in accordance with the directions of counsel for appellant, the order of this court allowing the appeals herein to the Supreme Court and the præcipes filed by counsel for the appellant;

And I hereby certify that said foregoing transcript of the record and proceedings, together with the original papers, documents, and exhibits, which were sent up from the District Court of the United States for the Western District of Virginia for inspection of the said Circuit Court of Appeals under stipulation of the parties in said record that the same were not required to be printed, and which under my certificate dated December 30th, 1915, were identi-
240 fied and sent up to the Supreme Court, as directed in the said order allowing appeal of December 10, 1915, and together with the appeals, orders allowing, appeal bond, præcipe, and citations sent up from the said District Court on said appeal No. 1277 and 1278, and not included in the formal transcript from the District Court under section 7 of rule 14 of said Circuit Court of Appeals, and which were by me identified and certified under my two certificates dated December 30th, 1915, and sent up to the Supreme Court, as directed in the said order allowing appeal of December 10, 1915, constitute the record on which said appeals No. 1277 and 1278 were tried in said Circuit Court of Appeals, together with all proceedings had therein on the said appeals entered by the United States to the Supreme Court and allowed by orders of Circuit Justice Knapp, December 10, 1915, and January 21, 1916, as will more fully appear in the foregoing transcript, as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 10th day of June, A. D. 1916.

[SEAL.] HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.
By CLAUDE M. DEAY,
Deputy Clerk.

241 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Daniel J. Leary and George Leary, administrators of James D. Leary, deceased; to Luther Laflin Kellogg; to the Norfolk & Western Railway Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 9th day of January, 1916, pursuant to an appeal filed by the United States of America in the clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit, and duly allowed on the 10th day of December, 1915, in the appeal causes numbered on the docket of and entitled in said Circuit Court of Appeals as No. 1277, Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellants, versus The United States of America, and Luther Laflin Kellogg, appellees, and No. 1278, Luther Laflin Kellogg, appellant, versus The United States of America, Norfolk & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees, which were heard and disposed of as one cause in said Circuit Court of Appeals, to show cause if any there be why the decrees rendered against the said United States, as in the order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this tenth day of December, 1915.

MARTIN A. KNAPP,
Circuit Judge.

242 Service of the within citation and receipt of a copy thereof admitted for Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, this December 16th, 1915.

J. T. COLEMAN,
AUBREY E. STRODE,
Solicitors of Record for said Daniel J. Leary and George Leary, Administrators as aforesaid.

Service of the within citation and receipt of a copy thereof admitted for Luther Laflin Kellogg this December 20th, 1915.

ABRAM J. ROSE,
Solicitor of Record for L. Laflin Kellogg.

Service of the within citation and receipt of a copy thereof admitted for the Norfolk & Western Railway Company this December 21st, 1915.

THEODORE W. REATH,
Solicitor of Record for Norfolk & Western Railway Company.

(Indorsed:) Original citation. To Supreme Court of the United States. United States of America, appellants, versus Daniel J. Leary and George Leary, administrators of James D. Leary, deceased; Luther Laflin Kellogg and Norfolk & Western Railway Company, appellees. On appeal from decrees of the United States Circuit Court of Appeals, 4th Circuit, of November 12th, 1915, in appeal causes numbered therein 1277 and 1278.

243 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Daniel J. Leary and George Leary, administrtors of James D. Leary, deceased; to Luther Laflin Kellogg; to the Norfolk & Western Railway Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 19th day of February, 1916, pursuant to an appeal filed by the United States of America in the clerk's office of the United States Court of Appeals for the Fourth Circuit, and duly allowed on the 21st day of January, 1916, from decree entered on the 12th day of November, 1915, in the appeal cause numbered on the docket of and entitled in said Circuit Court of Appeals as No. 1277, Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellants, versus the United States of America and Luther Laflin Kellogg, appellees, to show cause, if any there be, why the decree rendered against the said United States, as in the order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 21 day of January, 1916.

MARTIN A. KNAPP,
Circuit Judge.

244, 245 Service of the within citation and receipt of a copy thereof admitted for Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, this 1st day of February, 1916.

J. T. COLEMAN,
Solicitor of Record for said Daniel J. Leary and George Leary, administrators as aforesaid.

Service of the within citation and receipt of a copy thereof admitted for Luther Laflin Kellogg, this 2d day of F b'y, 1916.

ABR- J. ROSE,
Solicitor of Record for L. Laflin Kellogg.

Service of the within citation and receipt of a copy thereof admitted for the Norfolk & Western Railway Company, this 3rd day of February, 1916.

THEODORE W. REATH,
Solicitor of Record for Norfolk & Western Railway Company.

246 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Luther Laflin Kellogg; to Daniel J. Leary and George Leary, administrators of James D. Leary, deceased; to the Norfolk & Western Railway Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 19th day of February, 1916, pursuant to an appeal filed by the United States of America in the clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit, and duly allowed on the 21st day of January, 1916, from decree entered on the 12th day of November, 1915, in the appeal cause numbered on the docket of and entitled in said Circuit Court of Appeals as No. 1278, Luther Laflin Kellogg, appellant, versus The United States of America, Norfolk & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees, to show cause, if any there be, why the decree rendered against the said United States, as in the order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 21 day of January, 1916.

MARTIN A. KNAPP,
Circuit Judge.

247 Service of the within citation and receipt of a copy thereof admitted for Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, this 1st day of February, 1916.

J. T. COLEMAN,
Solicitor of Record for said Daniel J. Leary and George Leary, administrators as aforesaid.

Service of the within citation and receipt of a copy thereof admitted for Luther Laflin Kellogg, this 2 day of Feby, 1916.

ABRAM J. ROSE,
Solicitor of Record for L. Laflin Kellogg.

Service of the within citation and receipt of a copy thereof admitted for the Norfolk & Western Railway Company, this 3rd day of February, 1916.

THEODORE W. REATH,
Solicitor of Record for Norfolk & Western Railway Company.

248 (Original.)

In the Supreme Court of the United States. For Oct. term, 1916.

THE UNITED STATES OF AMERICA, APPELLANT,
against
DANIEL J. LEARY ET AL., APPELLEES. } No. 527.

(Three appeals from United States Circuit Court of Appeals, 4th Circuit, in one transcript. Appeal allowed Dec. 10, 1915, from decree entered on Nov. 12, 1915, under case docket numbers 1277 and 1278; appeal allowed January 21, 1916, from decree entered November 12, 1915, under case docket number 1277; appeal allowed January 21, 1916, from decree entered November 12, 1915, under case docket number 1278.)

To the Clerk of the Supreme Court of the United States:

DEAR SIR: The clerk of the United States Circuit Court of Appeals, 4th Circuit, having sent up to the Supreme Court, on the above-stated appeals of the United States, the following:

(A) A transcript of the record, under certificate of said clerk of the circuit court of appeals, dated June 10, 1916, embracing the record on which the said cause was tried in the United States circuit court of appeals, and the proceedings for the three appeals taken, respectively, on Dec. 10, 1915, and January 21, 1916, with the exception of the matters designated under (B), (C), and (D) herein below:

(B) Under identifying certificate of said Circuit Court of Appeals, dated Dec. 30, 1915, all the testimony in the removal
249 record and other evidence, identified by the clerk of the district court and sent up to the Circuit Court of Appeals for the inspection of the latter as occasion might require, but which was not to be put in the formal transcript or required to be printed under the stipulations of the parties of March 27th and 31st, 1914.

(C) Under identifying certificate of said clerk of the Circuit Court of Appeals, dated December 30, 1915, for inspection of Supreme Court if occasion should require it, those parts of the original papers relating to the appeal from district court of Mary C. Leary, administratrix, which, under rule of the said Circuit Court of Appeals, were identified and sent up outside of the transcript from the district court for inspection if required, and by said rules and stipulation of the parties of March 27, 1914, were not to be printed.

(D) Under identifying certificate of said clerk of the Circuit Court of Appeals, dated December 30, 1915, for inspection of the Supreme Court if occasion should require it, those parts of the original papers relating to the appeal from the district court of Luther Laflin Kellogg, which under rule of the said Circuit Court of Appeals were identified and sent up outside of the transcript from the

district court for inspection if required, and by said rules and stipulation of the parties of March 31, 1914, were not to be printed.

Now therefore, in compliance with the provisions of rule 10 of the Supreme Court, the undersigned, on behalf of the appellant in each of said appeals, states:

(1) Appellant relies upon the points numbered from I to XXV, inclusive, in the assignments of errors filed with the respective petitions for appeals and so numbered for each of said appeals.

(2) Appellant designates all the record and matter con-
250 tained in the transcript dated June 10, 1916, and referred to in paragraph (A) above as necessary for the consideration of the Supreme Court on said appeals and on the errors assigned, and necessary to be printed for use on said appeals.

(3) Appellant designates as not necessary to be printed the matters embraced and described in paragraphs (B), (C), (D), and as being under the stipulation of the parties unnecessary for consideration by the court otherwise than by inspection of the papers therein sent up, as identified, should occasion make it necessary for either party to ask such inspection, or should the court desire such inspection.

(4) The clerk of the Circuit Court of Appeals, having inserted in the transcript copies of the several citations with service thereof, and having also attached to the transcript the original citations with service thereof, it will not be necessary to print these papers twice.

Very respectfully,

MARION ERWIN,
Special Assistant to the Attorney General,
Solicitor of Record for the United States, Appellants.

Dated June 27th, 1916.

Service admitted this 29 June, 1916.

ABRAM J. ROSE,
KELLOGG & ROSE,
Solicitors for L. L. Kellogg.

Service admitted this 1st day of July, 1916.

AUBREY E. STRODE,
Solicitor for Daniel J. Leary and George Leary,
Administrators of James D. Leary, deceased.

251 Service admitted this 5th day of July, 1916.

THEODORE W. REATH,
Solicitor for Norfolk & Western Railway Co.

252 (Indorsed:) United States Supreme Court, No. 527. October term, 1916. United States of America, appellant, vs. Daniel J. Leary et al., appellees. Appellant's notice to clerk Supreme

Court of record to be printed and service. Office of the clerk. Received Jul. 8, 1916. Supreme Court U. S.

253 File No. 25357. Supreme Court U. S. October term, 1916. Term No. 527. The United States, appellant, vs. Daniel J. Leary et al. Designation by appellant of parts of record to be printed. Filed July 8, 1916.

(Indorsed:) File No. 25357. U. S. Circuit Court Appeals, 4th Circuit. Term No. 527. The United States, appellant, vs. Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, Luther Laflin Kellogg, and the Norfolk & Western Railway Company. Filed June 15th, 1916. File No. 25357.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1916

Office Supreme Court, U. S.
FILED
OCT 1 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1917.

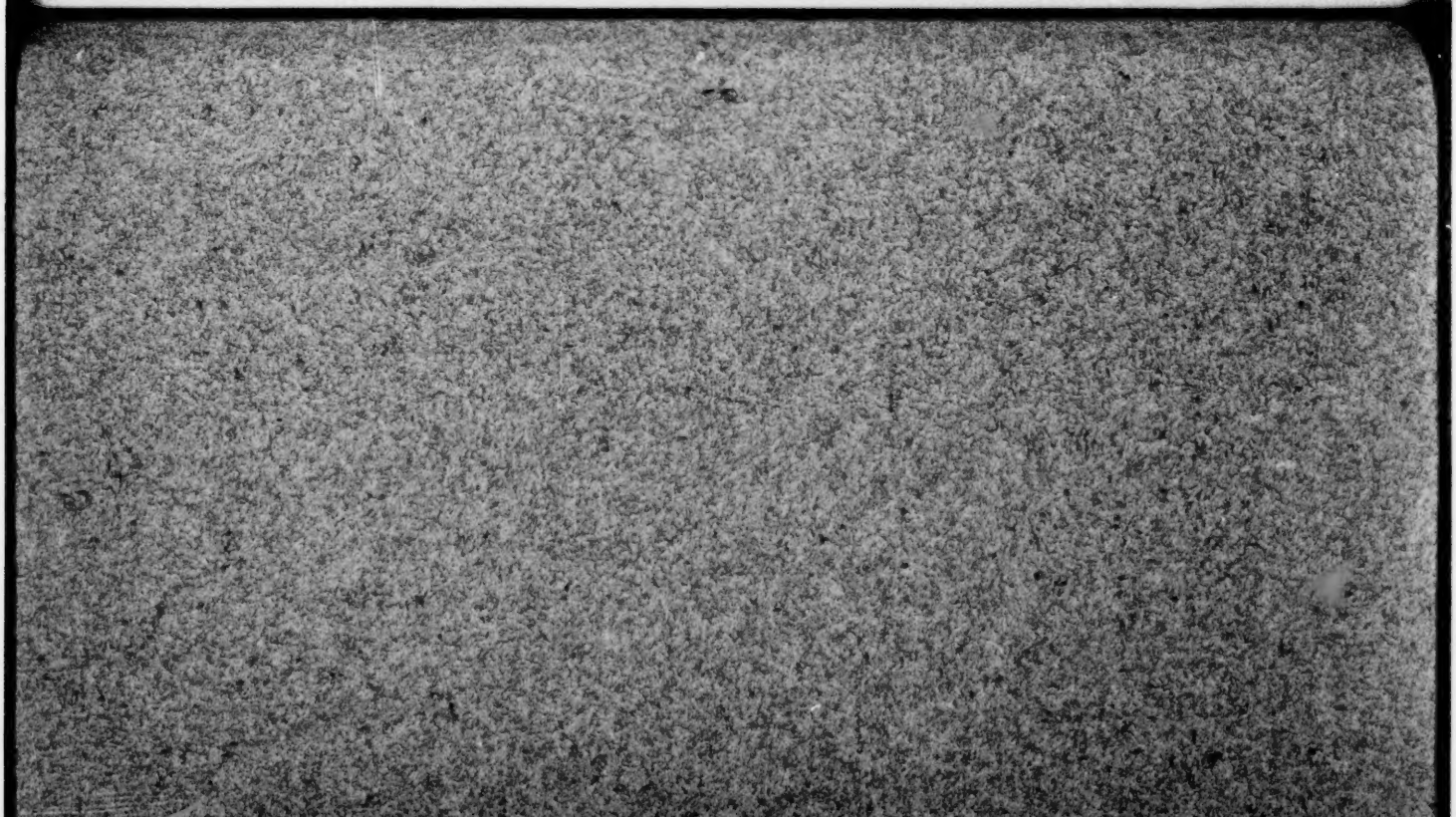
No. 194.

THE UNITED STATES,
Appellant,
v.
DANIEL J. LEARY and GEORGE LEARY, Administrators of JAMES LEARY, deceased, LUTHER LAFLIN KELLOGG and THE NORFOLK & WESTERN RAILWAY COMPANY,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR LUTHER LAFLIN KELLOGG,
Appellee.

Lapham & Franklin Printing Co., 34-38 South William St., New York



SUPREME COURT

OF THE UNITED STATES.

THE UNITED STATES, *Appellant,* *against* DANIEL J. LEARY and GEORGE LEARY, Administrators of JAMES D. LEARY, deceased, LUTHER LAFLIN KELLOGG and the NORFOLK & WESTERN RAILWAY COMPANY, *Appellees.*	October Term, 1917. No. 194.

BRIEF FOR APPELLEE LUTHER LAFLIN KELLOGG.

Statement.

This case comes before this Court on an appeal from a decree of the CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, reversing the decree of the DISTRICT COURT OF THE UNITED STATES for the WESTERN DISTRICT OF VIRGINIA, rendered upon a trial before the HONORABLE HENRY C. MCDOWELL, DISTRICT JUDGE, adjudging that 400 shares of the common stock of the Norfolk & Western Railway Company, standing in the name of Luther Laflin Kellogg, appellee, on the books of said Company, were purchased by funds fraudulently obtained from the United States by Benjamin D. Greene in con-

nection with the contracts for the improvement of the harbor at Savannah, Georgia, and that said stock is the property of the United States, and directing that this cause be remanded to the DISTRICT COURT for the WESTERN DISTRICT OF VIRGINIA for further proceedings, in accordance with the opinion of the CIRCUIT COURT OF APPEALS.

See Final Decree, District Court, pp. 86 and 87;
See Decree, Circuit Court of Appeals, pp. 151, 152;
See Petition for Appeal, pp. 152, 153;
See Assignment of Errors, pp. 153-159;
See Order allowing Appeal, pp. 159, 160.

The bill of complaint filed by the Government charged that the 400 shares of Norfolk & Western Railway Company stock referred to were bought by funds fraudulently obtained from the United States by Benjamin D. Greene in connection with the contracts for the improvement of the harbor at Savannah, Georgia, and prayed that said stock be adjudged the property of the United States, and that the certificates standing in the name of Luther Laflin Kellogg be delivered up for cancellation and that new certificates therefor be issued to and for the use of the United States.

See Bill of Complaint, pp. 11 to 35.

To the bill filed Benjamin D. Greene, Luther Laflin Kellogg and the Norfolk & Western Railway Company were made parties defendant.

Greene made no answer to the bill and a decree *pro confesso* was taken against him. (See Record, p. 3.)

The Norfolk & Western Railway Company answered setting up that it was a mere stake-

holder, and submitting its rights and interests to the Court. (See Record, p. 3.)

The defendant Kellogg served an amended answer denying that he had any knowledge or notice of the alleged fraudulent acquisition of said securities by Greene, and setting up proceedings taken against Greene based on the alleged fraud and his arrest to answer the charges made and the giving of bail for his appearance with one James D. Leary as surety, and averring that at the time of the execution by said Leary on December 14th, 1899, of a bail bond for $20,000 for the appearance of Greene to answer the charges made, Greene placed in the hands of Kellogg to secure Leary against any loss which he might sustain by reason of his becoming bail, 300 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company, with the understanding that at any time he desired he might withdraw the securities so deposited and dispose of them, substituting others in their place; that the securities so deposited, it was agreed, were also to be held by Kellogg to secure him for the fees and disbursements that might be incurred by him or his firm in defending Greene or in caring for his interests in any proceedings brought by the United States against him, or in any other matters, there being several matters in litigation in which Greene was interested pending in Kellogg's office; that subsequently, on the demand of Greene, the Delaware, Lackawanna & Western Railroad Company stock was sold and the proceeds thereof taken from Kellogg's custody and control, and other stocks which were in his custody were also sold at or about that time and part of the proceeds thereof were invested in 500 shares of Norfolk & Western Railway Company

stock, 100 shares of which were withdrawn by Greene, leaving only the certificate for 400 shares in Kellogg's hands.

> See Amended Answer of Defendant Luther Laflin Kellogg, Record, pp. 35-49.

The amended answer was filed on October 3rd, 1913, in place of an original answer filed in June, 1904 (see Record, pp. 3-4), under a stipulation that its filing should not be cause for delay in the trial of the case on the merits (see Stipulation, Record, p. 50).

After the action was at issue and testimony had been taken therein and the case was ready for final hearing, and on April 18th, 1908, Mary C. Leary, as Administratrix of James D. Leary, deceased, filed a petition for leave to intervene as a party defendant, setting up that the 400 shares of stock sought to be recovered by the United States were held by Kellogg under an agreement by him to indemnify her decedent from all loss by reason of his becoming bail for Greene in the sum of $40,000 for the appearance of said Greene to answer to an indictment found against him in the United States Circuit Court for the Southern District of Georgia, charging him with conspiracy to defraud the United States in connection with the improvement mentioned.

The motion to intervene came on for hearing before *District Judge McDowell*, sitting in the Circuit Court, and on July 20th, 1908, a decision was rendered denying the petition to intervene, principally on the ground, as appears by the opinion written, that a contract to indemnify bail in a criminal case is void by public policy, and that a

Court of Equity would not undertake to enforce an invalid contract.

> United States *vs.* Greene, 163 Fed. Rep., 442.

From the decision rendered an appeal was taken to the Circuit Court of Appeals, Fourth Circuit, and on December 7th, 1910, a decision was handed down affirming the order appealed from.

The Circuit Court of Appeals, while entertaining the same view as the Circuit Court as to a contract to indemnify bail in a criminal case being void by public policy, did not rest its decision on that precise ground, but on the ground that the intervenor had been guilty of laches in making her application, more than four years having intervened between the commencement of the action and her motion to intervene.

> Leary *vs.* United States, 184 Fed. Rep., 433.

An appeal was thereupon taken by Mrs. Leary to the Supreme Court, which Court on May 13th, 1912, reversed the decree of the Circuit Court of Appeals and directed that leave to intervene be granted as prayed.

The opinion was written by *Mr. Justice Holmes*, who expressed the view:

(1) That the facts did not show such laches on the part of the intervenor as to prevent her from presenting her claim for hearing and decision; and

(2) That an agreement to indemnity bail in a criminal case is not void by public policy.

> Leary *vs.* United States, 224 U. S., 567.

On May 20th, 1913, an amended bill of intervention was filed by Mrs. Leary, setting out:

1st: That proceedings were brought against Greene, charging him with conspiring with John F. Gaynor and Oberlin M. Carter to defraud the United States and the arrest of Greene under a warrant issued by John A. Shields, United States Commissioner for the Southern District of New York, and that he was held in bail of $25,000 to await a warrant of removal to the State of Georgia for trial.

2nd: That through the mediation of the defendant Kellogg, the intervenor's decedent became a bondsman for Greene, and at the time of the execution of the bail bond Greene placed in the hands of Kellogg, as trustee and depositary, to secure her decedent against loss, 300 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company, which stock was thereafter withdrawn by Greene and 400 shares of the common stock of the Norfolk & Western Railway Company were deposited in their place and stead.

3rd: That Greene was thereafter removed to the State of Georgia for trial and held in bail in the sum of $40,000 for his appearance, and that her decedent became bail for Greene in the sum of $40,000, upon the condition and understanding that the securities held in trust by Kellogg should remain as security and indemnity to her decedent against all loss.

4th: That thereafter Greene was called for trial in the District Court of the United States for the Southern District of Georgia and made default in appearance, whereupon his bail was forfeited.

5th: That thereafter suit was brought by the United States against the intervenor as Adminis-

tratrix of her decedent to recover upon said bail bond executed by him, in which proceeding judgment was entered in favor of the United States on January 6th, 1908, for the sum of $35,377.46, which judgment, with interest and costs, amounting to the sum of $40,802.00, was paid by her on December 31st, 1910.

By reason of the above facts she claimed that she was entitled to be indemnified out of the securities referred to prior to any claim of the United States therein.

See Amended Bill of Intervention of Mary C. Leary, Administratrix, Record, pp. 14-24.

On the trial, in support of the bill, the complainant offered the following proof:

1st: A stipulation as to certain items set forth in *Exhibit F* annexed to the bill of complaint.

See Stipulation No. 1, Record, pp. 76-81.

2nd: A stipulation as to the use of testimony taken before Commissioner Shields in the City of New York on proceedings for the removal of Greene to Georgia.

See Stipulation No. 2, Record, pp. 81-82; p. 85.

3rd. A stipulation as to the use of affidavits, with the exhibits thereto attached, which were offered on the part of the United States in evidence at the hearing for an injunction *pendente lite*.

See Stipulation No. 2, Record, pp. 82-84.

4th: The testimony of L. Laflin Kellogg and Franklin Nevius taken in the present action relative to stocks and proceeds of the sale of stocks

delivered by Greene to said Kellogg, other than the 400 shares of Norfolk & Western Railway Company stock in suit. (See Record, pp. 72-75.)

For the purposes of the appeal it was by stipulation conceded that the testimony taken on the proceedings for the removal of Greene to Georgia established the conspiracy charged in the bill, and that fraudulent profits from said contracts were divided between the contractors, Greene and Gaynor and Captain Carter, as charged; and that the aggregate amount of fraudulent profits received for his share by Greene was $722,528.03.

See Stipulation, Record, pp. 6-7.

This stipulation was made as of necessity and to avoid the tremendous expense of printing the record of the testimony in the proceedings referred to.

It also was conceded by stipulation that the transactions purported to be set out in *Exhibit F* annexed to the Bill were had as therein stated, but it was not conceded that the 400 shares of Delaware, Lackawanna & Western Railroad Company stock mentioned therein as having been sold through A. W. Kilborne & Company for the account of Kellogg on March 23rd, 1900, were purchased with any of the funds wrongfully obtained from the United States by Greene or with the proceeds of investments or re-investments of said funds by him or on his behalf, or that the proceeds of 600 shares of Canada Southern Railway Company stock referred to in said *Exhibit F* as having been sold on March 23rd, 1900, through said A. W. Kilborne & Company for the account of Kellogg, or the proceeds of 100 shares of Canada Southern Railway Company stock mentioned in said exhibit as having been sold on March 26th,

1900, through said A. W. Kilborne & Company, were invested in whole or in part, directly or indirectly, in the shares of Norfolk & Western Railway Company stock involved in this suit.

See Stipulation, Record, p. 7.

On behalf of the defendant Kellogg, pursuant to stipulation duly made, an affidavit sworn to by him was received in evidence on the trial with the same force and effect as if the testimony contained therein had been given in open Court or before an examiner pursuant to notice. (See Record, pp. 69-70.)

In the affidavit Mr. Kellogg swore:

(1) That he was a member of the firm of Kellogg & Rose, attorneys and counsellors-at-law of the State of New York, which firm was the successors of the firm of Kellogg, Rose & Smith, of which he also was a member.

(2) That he first became acquainted with Greene in the Spring of 1893, when his firm represented Greene and other parties interested with him in litigation against the East River Gas Company of Long Island City, pending in the United States Court for the Southern District of New York, and in November, 1893, also represented him in another suit pending in the United States Court to recover on an alleged stock subscription, both of which matters involved a large amount of money, and by reason of his connection therewith as attorney he knew Greene to be a man of standing and importance in the business world and possessed of considerable means.

(3) That at the time of the institution of the proceedings by the United States against Greene, based on the alleged fraudulent transactions re-

ferred to in the Bill, viz: in December, 1899, and on December 14th, 1899, **when certain securities were deposited with him he had no knowledge of the sources from which said securities were acquired other than the fact that they were turned over to him by Greene as the owner thereof and they were received in absolute good faith and without suspicion or notice of any fraud or taint in their title or of any fraud in their acquisition or of any adverse claim whatsoever.**

(4) That in the proceedings instituted by the United States he did not personally represent Greene as counsel nor did he represent those claimed to have been associated with him in the fraudulent acquisition of moneys from the Government, but said Greene and those associated with him were represented by his (deponent's) partner, Abram J. Rose, Esq., and that he (Kellogg) had no personal knowledge of the facts disclosed by said proceedings and took no part therein, except on one occasion when he took part in the examination of one Robert F. Westcott, a witness, which examination took place on or about August 10th, 1900.

(5) That at the time of the receipt of the securities, and during the pendency of the proceedings instituted by the United States, Greene denied that he had been in any way guilty of any fraud in connection with the matters referred to in the complaint, and that he (Kellogg) so believed.

(6) That the securities described in the letter dated December 14th, 1899, from deponent to James D. Leary, to wit: 300 shares of Delaware, Lackawanna & Western Railroad Company stock, were left with him (Kellogg) by Greene at that time for the purpose in said letter stated and also to secure him and his firm for the fees and disbursements that might be incurred in defend-

ing Greene or in caring for his interests, there being several matters in litigation in which Greene was interested pending in the deponent's office.

The letter referred to in the affidavit of Mr. Kellogg is as follows:

"December 14th, 1899.

"James D. Leary, Esq.,

"My dear Sir:—

"Captain Benjamin D. Greene has placed "in my hands as indemnity to you for be- "coming his bondsman in the matter of the "United States against Greene, Gaynor & "others, now pending in the District Court, "three hundred shares of the capital stock "of the Delaware, Lackawanna & Western "Railroad Company. It is understood that "I am to hold these until you are released "from the said bond, or in case that your "liability should be established, that it is to "be applied in payment of your obligation.

"I am,

Yours truly,

"L. LAFLIN KELLOGG."

See Affidavit Luther Laflin Kellogg, Record, pp. 70-72.

On behalf of Mrs. Leary there were offered in evidence besides the letter of December 14th, 1899, above mentioned, three other letters from Mr. Kellogg to James D. Leary dated, respectively, January 19th, 1900, May 21st, 1901, and June 6th, 1901.

The letter of January 19th, 1900, reads:

"New York, Jan. 19, 1900.

"James D. Leary, Esq.,
Hoffman House,
New York City.

"My dear Mr. Leary:—

"I herewith send you the letter which you "were entitled to have in regard to your "qualification as bondsman for Captain "Greene. I was waiting for you to call for "it.

"As you see, I wrote the letter the very "day that I received the stock.

"Yours very truly,
"L. LAFLIN KELLOGG."

(See Record, p. 66.)

(The letter enclosed was the letter of December 14th, 1899, above referred to.)

The letter of May 21st, 1901, reads:

"New York, May 21st, 1901.

"James D. Leary, Esq.,
17 State Street,
New York City.

"My dear Mr. Leary:

"It will be necessary to renew the bail "given by you for Capt. Greene, and for "which I hold the security for your protec- "tion, on Thursday morning next at at 10:30.

"Will you kindly come to this office for that "purpose about 10:15. I am very sorry to "trouble you but it cannot be helped. This "new bond is to take the place of the old one "without additional liability.

"Yours truly,
"L. LAFLIN KELLOGG.

"Call up Mr. Kellogg."

(See Record, p. 67.)

The letter of June 6th, 1901, is in the following words:

"New York, June 6th, 1901.

"James D. Leary, Esq.,
17 State Street,
New York City.

"My dear Mr. Leary:

"I am obliged to trouble you again to re-
"new the bond in the Greene and Gaynor mat-
"ter. I will have to trouble you to be in Court
"between ten and half past ten Saturday
"morning.

"The reason for the matter is not that you
"have to incur any additional liability but
"simply to enable them to carry their case to
"the United States Supreme Court.

"All the parties and all the other bonds-
"men will be on hand before Judge Lacombe
"by a special arrangement (as the Judge is
"going away) on Saturday morning at half
"past ten.

"Please let me hear from you today as the
"matter is most important.

"With kindest regards and hoping that you
"did not suffer from your misstep in the of-
"fice, I am,

"Yours very truly,

"L. LAFLIN KELLOGG."

(See Record, pp. 69-70.)

The learned District Judge, without writing any opinion setting forth the grounds for the conclusions reached by him, rendered a decision in favor of the complainant and directed the cancellation of the certificates standing in the name of Mr. Kellogg, and that a new certificate be is-

sued in the name of a person to be designated by the Attorney General.

See Final Decree (Record, pp. 86 to 88).

Separate appeals from the final decree were taken to the CIRCUIT COURT OF APPEALS by Mrs. Leary, as Administratrix, on January 24th, 1914 (see Record, p. 94) and by Mr. Kellogg on February 27th, 1914. (See Record, p. 94.)

On March 27th, 1914, a stipulation was entered into between Mrs. Leary and the United States relative to the evidence to be printed in the record on appeal (see Record, pp. 2 to 11) and on March 31st, 1914, a stipulation was entered into by Mr. Kellogg ratifying and confirming the stipulation of March 27th, 1914, above mentioned (see Record, pp. 94-95).

Pursuant to the stipulations made, both appeals came before the CIRCUIT COURT OF APPEALS on the same transcript of record. The CIRCUIT COURT OF APPEALS reversed the decree of the DISTRICT COURT and directed that the cause be remanded to the DISTRICT COURT for further proceedings, in accordance with the opinion rendered. (See Record, p. 151.)

The opinion written is reported in *Leary* v. *United States*, 229 Fed. Rep., 660.

In its opinion the Circuit Court of Appeals stated that it would, for the purposes of the appeal, assume, without discussing the evidence, that the Norfolk & Western Railway Company shares or securities for which they were substituted were purchased by Greene with funds of which he had defrauded the Government (see Record, pp. 144-145), but that both Mr. Kellogg and James D. Leary, the decedent, were *bona fide* holders of said securities; that they had been bought without

knowledge of Greene's wrongdoing, and that the Leary estate was entitled to be indemnified out of said securities to the extent of the amount paid by said estate to the Government in satisfaction of the judgment entered on the forfeited recognizance.

(See Record, pp. 145-151.)

Before the hearing by the CIRCUIT COURT OF APPEALS, Mrs. Leary died and Daniel J. Leary and George Leary were appointed Administrators of James D. Leary in her place and stead. (See Record, pp. 142-143.)

From the decree of the CIRCUIT COURT OF APPEALS the UNITED STATES now appeals to this Court After such appeal was taken the appellees moved to dismiss the appeal on the ground that the decree of the CIRCUIT COURT OF APPEALS was not a final judgment in form or substance. The motion to dismiss the appeal was, however, denied.

On behalf of the appellee Kellogg its was contended in the Court below, and will be contended here, that the decree of the Circuit Court of Appeals was right and should be affirmed—

First: Because there was no proof that the stock, the certificates for which were directed to be delivered up for cancellation, was purchased by moneys fraudulently received by Greene from the United States;

Second: Because Kellogg was a *bona fide* holder of said stock, as trustee, and had an equity therein superior to that of the United States even if, as claimed, said stock had been purchased with moneys fraudulently received.

In addition to these contentions on the merits, the appellee Kellogg desires to again urge before

the Court the contention that the appeal of the Government will not lie because the decree of the Circuit Court of Appeals is simply interlocutory and not final and can only become final after proceedings in accordance with the direction of the CIRCUIT COURT OF APPEALS are had in the District Court, and the amounts payable out of the trust fund are finally adjudicated and determined.

While as said, a motion to dismiss was made before this Court on this precise ground and denied, no opinion was written as to the grounds on which the refusal to dismiss was based. The full facts now appear by this printed record and the appellee believes it both his privilege and his duty to again urge the non-appealability of the decree of the CIRCUIT COURT OF APPEALS, and will present his contention in that regard as his first point in the following argument.

ARGUMENT.

POINT I.

The judgment of the Circuit Court of Appeals is not a final judgment in form or substance and the appeal should be dismissed.

The decree of the Circuit Court of Appeals directs "that the decree of the said District Court in this cause be and the same is hereby reversed; AND THAT THIS CAUSE BE AND THE SAME IS HEREBY REMANDED TO THE DISTRICT COURT OF THE UNITED STATES IN THE WESTERN DISTRICT OF VIRGINIA AT LYNCHBURG FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THE OPINION OF THIS COURT." (See Record, pp. 151, 152.)

If, as directed by the CIRCUIT COURT OF APPEALS, the cause had gone back to the DISTRICT COURT for further proceedings before a final judgment could have been entered, it would have been necessary to have put in evidence proof showing the recovery of the judgment against the Leary estate on the forfeited recognizance, the amount paid by that estate on such judgment and the date when the payment was made. Only upon this further proof would the DISTRICT COURT be in a position to determine whether, as claimed by the Government, the Leary estate had wrongfully carried on the litigation for the purpose of increasing the interest and whether the estate was entitled to recover the amount paid by it or some lesser amount. It also would have been necessary to offer proof in the DISTRICT COURT of the services and disbursements of Kellogg, as trustee, and on such evidence the DISTRICT COURT should have determined what allowance should be made to him for commissions and for expenses and fees in protecting his trust. The DISTRICT COURT should then have ascertained the amount of the accumulated dividends on the stock held in trust and directed its sale and out of the proceeds and the accumulated dividends directed the payment of the amount found due to the Leary estate, the amount due to Kellogg, as Trustee, and the amount due to the United States. Only in this way could a final decree be made which would settle the rights of all parties. Nor would the ascertainment of such amounts be mere mathematical calculations, but would involve the determination of questions of fact on the evidence presented and the exercise of judicial discretion in determining the rights and equities of the parties.

If this Court should affirm the decree of the CIRCUIT COURT OF APPEALS it still will be necessary to direct that the cause be remanded to the DISTRICT COURT for the purpose of having that Court receive evidence and determine how much should be paid to the Leary estate, how much to Kellogg and how much to the United States.

Clearly, therefore, the judgment of the CIRCUIT COURT OF APPEALS is not a final judgment in form or in substance, but merely interlocutory, and no appeal therefrom lies to this Court.

Judicial Code Sections 128, 241;
Bostwick *v.* Brinckerhoff, 106 U. S., 3;
U. S. *v.* Krall, 174 U. S., 384;
McFarland *v.* Brown, 187 U. S., 239;
U. S. *v.* Beatty, 232 U. S., 463.

If this appeal be dismissed and the cause ordered before the DISTRICT COURT for further proceedings the Government can suffer no prejudice because, if the decree made and the final judgment entered herein be erroneous, the United States may secure its correction by appeal to this Court.

U. S. *v.* Beatty, 232 U. S., 436;
U. S. *v.* Denver & Rio Grande Ry. Co., 191 U. S., 84;
Messenger *v.* Anderson, 225 U. S. 436;
Zickendorf *v.* Steinfeld, 225 U. S., 445;
Union Trust Co. *v.* Westhus, 228 U. S., 519.

POINT II.

The proof adduced utterly fails to show that the 400 shares of Norfolk & Western Railway Company stock in suit were purchased by moneys fraudently received by Greene from the United States.

FIRST: The burden of showing that said stock was purchased by moneys fraudulently obtained is upon the United States.

Schuyler *v.* Littlefield, 232 U. S., 707.

In that case it was said by this Court:

> "They (the complainants) were practically asserting title to $9,600 said to have been traced into stock in the possession of the trustee. LIKE ALL OTHER PERSONS SIMILARLY SITUATED THEY WERE UNDER THE BURDEN OF PROVING THEIR TITLE. IF THEY WERE UNABLE TO CARRY THE BURDEN OF IDENTIFYING THE FUND AS REPRESENTING THE PROCEEDS OF INTERBOROUGH STOCK, THEIR CLAIM MUST FAIL."

Schuyler *v.* Littlefield (*supra*), at p. 713.

SECOND: The complainant has utterly failed to sustain the burden of tracing the moneys claimed to have been fraudulently diverted into the stock in the possession of the trustee.

(1st.) For the purposes of this appeal it was stipulated by the appellees that the testimony taken in the removal proceedings of Greene to Georgia established the conspiracy charged in the bill and that Greene's share of the fraudulent profits amounted to $722,528.03. (See Record, pp. 6 and 7.)

This stipulation, as we have said, was made as of necessity to avoid the enormous expense of

printing the testimony in the proceedings referred to.

It also was conceded by stipulation that the transactions set out in EXHIBIT F, annexed to the bill, were had as therein stated. (See Record, p. 7.)

It, however, was not conceded that the 400 shares of Norfolk & Western Railway Company stock claimed for in suit were purchased with any of the funds so wrongfully obtained, or with the proceeds of investments or reinvestments of said funds by him or on his behalf. (See Record, p. 7.)

The burden, therefore, of producing evidence tracing the funds wrongfully diverted still remained with the complainant, and the necessity of offering proof of that fact was recognized and undertaken by the Government as part of its case on the trial before the District Court.

In the consideration of the sufficiency of the proof, this Court is unembarrassed by any independent examination of the evidence and any affirmative finding by the CIRCUIT COURT OF APPEALS, as in its opinion that Court distinctly said that for the purposes of the appeal it would assume "without discussing the evidence that the Norfolk & Western shares or securities for which they were substituted were purchased by Greene with funds on which he had defrauded the Government." (See Record, at bottom of p. 144.)

(2nd.) The 400 shares of stock of the Norfolk & Western Railway Company, it is claimed by the Government, were purchased with the proceeds of the sale on March 23rd, 1900, of 400 shares of the stock of the Delaware, Lackawanna & Western Railroad Company, realizing $35,791.50; 600 shares of the Canada Southern Railroad Company,

realizing $29,825; and on March 26th, 1900, of 100 shares of Canada Southern Railway Company stock, amounting to $4,975 and aggregating $70,591.50.

By Stipulation No. 1 as to certain items appearing in Exhibit F, annexed to the bill, it was conceded that on March 23rd, 1900, Mr. Kellogg sold, through the brokerage firm of A. W. Kilborne & Company 400 shares of Delaware, Lackawanna & Western Railroad Company stock (Certificates Numbers 122324 to 122327, inclusive) for $35,791.50; 600 shares of Canada Southern Railway Company stock (Certificates Numbers 24865 to 24873, inclusive) for $29,724.50; and on March 26, 1900, 100 shares of Canada Southern Railway Company (Certificate Number 24874) for $4,958.25. (See Record, p. 77.)

And by the stipulation referred to it was agreed:

> "That the proceeds of said securities so sold were used by A. W. Kilborne & Company as far as said proceeds went in the purchase in account kept in the name of 'L. L. Kellogg' of the following securities shown in Exhibit F: March 23, 1900, purchased by A. W. Kilborne & Company 1,000 shares of Canadian Southern Railway Company stock $51,775; March 26, 1900, purchased by A. W. Kilborne & Company in account kept in the name of L. L. Kellogg 500 shares of Norfolk & Western Railway Company stock for $18,812.50; that the said purchases and sales were conducted in the name of L. L. Kellogg for B. D. Greene and at the instance and request of B. D. Greene, the two items and purchases above referred to amounting to $70,587.50." (See Record, p. 77.)

It was further stipulated, however, that "the foregoing stipulation, wherever the expressions

'moneys of B. D. Greene' or 'check belonging to B. D. Greene,' or equivalent expression is used, it is understood that such expressions are not used as settling the rights of the parties as between the United States and the defendant, L. L. Kellogg, of the claim made by the complainant that said property rightfully belongs to it or as subject to its claim as a trust fund, nor does the defendant, L. L. Kellogg, intend thereby to admit such claim." (See Record, p. 81.)

The question, therefore, as to whether or not the securities claimed were purchased by the moneys fraudulently obtained was left open to be established by independent proof.

(3rd.) To avoid any discussion as to what the proof offered by the Government in support of its contention shows, the tracings of the trust moneys as made by the counsel for the Government in its brief will be taken as the basis of the appellee's contention that the proof was entirely insufficient to entitle the Government to follow the moneys fraudulently obtained into the stock into the hands of the trustee.

The tracings made by the learned Counsel for the Government show that on September 6th, 1893, Carter's disbursing check for $77,975.00 was deposited in the American Exchange National Bank of New York to the credit of the account of W. T. Gaynor, and a check by W. T. Gaynor on the American Exchange National Bank dated October 11th, 1893, for $37,000.00 was deposited to Greene's credit with Lee, Livingston & Company on that date. From the funds so deposited with Lee, Livingston & Company, it is claimed the 600 shares of Delaware, Lackawanna & Western Railroad Company stock were purchased on the same date for $45,862.50.

But absolutely no proof was offered by the Gov-

ernment showing in any way what the state of W. T. Gaynor's account in the American Exchange National Bank was before the deposit of the Government's check for $77,975.00, or what deposits or withdrawals were made by him between September 6th, 1893, and October 11th, 1893, a period of more than a month, on which last-named date Gaynor drew his check to Greene's order for $37,000.00.

Nor was the slightest proof offered to show what was the state of Greene's account with his brokers, Lee, Livingston & Company, on October 11th, 1893, when the Gaynor check for $37,000.00 was deposited and the purchase of the 600 shares of Delaware, Lackawanna & Western stock for $45,862.50 was made.

The tracings by the learned Counsel for the Government show that on September 10th, 1894, there was deposited in the American Exchange National Bank to the credit of B. D. Greene Carter's disbursing checks aggregating $160,683.74, and that on September 11th and 12th, 1894, checks of B. D. Greene on the American Exchange National Bank were deposited to his credit with Lee, Livingston & Company for $10,000 and $90,161.75 respectively, and that on September 12th, 1894, there was purchased by Lee, Livingston & Company for Greene 400 shares of Delaware, Lackawanna & Western stock for $33,925.

But there was no evidence showing the state of the account of Greene in the American Exchange National Bank on September 12th, 1894, at the time of the purchase of the additional shares of Delaware, Lackawanna & Western stock for $33,925.00.

The tracings by the learned Counsel for the Government show that on July 6th, 1897, there

was deposited to the credit of Greene in the Knickerbocker Trust Company, Carter's disbursing checks aggregating $575,749.70; that on July 27th, 1897, by Greene's check on the Knickerbocker Trust Company there was deposited to his credit with Lee, Livingston & Company $125,000, and that on September 24th, 1897, there were purchased by said brokers for his account 500 shares Canada Southern Railway stock for $29,937.50, and on November 3rd, 1897, 200 shares of Canada Southern Railway stock for $10,420.55.

But there is not a scintilla of proof as to the state of his account in the Knickerbocker Trust Company on September 24th, 1897, at the time of the purchase of the 500 shares of Canada Southern Railway Company stock for $29,937.50, or on November 3rd, 1897, at the time of the purchase of the 200 shares of the Canada Southern Railway Company stock for $10,420.55.

The contention of the Government therefore is, that, because antedating these purchases various sums paid by the Government were deposited in Greene's accounts in the institutions referred to, the inference is that the specific moneys so deposited were used in the purchase of the securities referred to, and the Court is left to conjecture and surmise what the state of Greene's accounts in the banks named was, when the checks for the purchase of the securities were drawn; from what sources of deposit the balances drawn upon arose; whether or not the trust funds had been exhausted and dissipated by other withdrawals, or what part had been withdrawn and what part, if any, remained.

As to the 700 shares of Canada Southern stock, 500 shares of which were bought on September 24th, 1897, and 200 shares on November 3rd, 1897,

moreover, the proof is specific to the effect that prior to their purchase the deposit of $125,000, made by Greene with Lee Livingston & Company on July 27th, 1897 (which the Government claims was part of the fraudulent payment made to him on July 6th, 1897, by Carter's disbursing checks aggregating $575,749.70), was dissipated and entirely exhausted prior to the purchase of the 700 shares of the Canada Southern Railway Company stock referred to. Between July 28th, 1897, and September 21st, 1897, securities, aggregating in value, in round numbers, $175,000, were purchased by Lee Livingston & Company for Greene's account, an amount over $50,000 in excess of the check of $125,000 deposited with them on July 27th, 1897. (See Exhibit 701.)

The purchases of the 700 shares of Canada Southern stock were on September 24th, 1897, and November 3rd, 1897, **both dates being subsequent to the purchase of $175,000 worth of securities between July 27th and September 21st, 1897.** Besides, on May 21st, 1897, securities were sold by Lee Livingston & Company for Greene, the proceeds of which amounted to $80,850. Of this amount there was turned over by check on May 24th, 1897, to the American Exchange National Bank checks for $49,000 and $15,000, amounting to $64,000, and on May 25th, 1897, there was paid to Greene a check to balance the account amounting to $9,314.24. Thus, amounts aggregating $73,314.24 were received by him on those dates. On July 27th, 1897, after the receipt of such payments, the deposit of $125,000 with Lee, Livingston & Company was made (see Exhibit 701), of which sum the $73,314.24 received by him previously and within two months of the deposit could easily have formed, and probably did form, a large part. In any event, there was not a scin-

tilla of proof showing that it did not, and the burden of proving that fact was on the Government.

That Greene was possessed of other sources of income and moneys from other sources were used by him in opening and conducting his account with Lee, Livingston & Company also expressly appears by the proof.

By *Exhibit* 700 it appears that Greene, on May 7th, 1892, *before any payment by the Government*, borrowed from the American Exchange National Bank $26,000, and on July 8th the further sum of $5,000, making together $31,000, and deposited as collateral security the following securities:

$5,000 Bonds Richmond & West Point Terminal, 5%.
$5,000 Bonds Tennessee Coal & Iron Company.
$6,500 Bonds Missouri, Kansas & Texas, Firsts.
$5,500 Bonds Missouri, Kansas & Texas, Seconds.
25 Shares Missouri, Kansas & Texas, Preferred Stock.
200 Shares Long Island.
100 Shares Delaware & Hudson.
25 Shares Chicago & Northwestern.
40 Shares American Telegraph & Cable Company.

On February 1st, 1893, *with the same collateral*, he borrowed the additional sum of $10,000, and on March 7th, *with the same collateral*, he borrowed the additional sum of $4,000.

By *Exhibit 701* it appears that the account with Lee, Livingston & Company was opened on March 22nd, 1893, by the receipt by B. D. Greene of $5,000 Tennessee Coal & Iron Firsts, which were sold for $4,468.75, and other securities bought with their proceeds.

On October 24th, 1893, Greene turned over to his brokers $10,000 Missouri, Kansas & Texas Firsts. (See Exhibit 701.) Of these, $6,500 bonds were owned by him *on July 8th, 1892*, and deposited by him with the American Exchange National Bank as collateral. (See Exhibit 700.)

On the same day Greene delivered to the brokers $5,000 Missouri, Kansas & Texas Seconds. (See Exhibit 701.) These also were owned by him *on July 8th, 1892*, and were part of the securities deposited by him with the American Exchange National Bank as collateral. (See Exhibit 700.)

We have not taken time to trace out other securities, as we deem the ones referred to sufficient for the purpose of argument under this point as showing that there were turned over to the speculative account conducted by Lee, Livingston & Company for Greene *securities owned by him prior to January 3rd, 1893, the date when the first alleged fraudulent payment was made to him*, thus showing conclusively that he had other sources from which the securities represented by that account were purchased.

Besides, the account itself shows that from time to time securities were sold by the brokers and the proceeds used in the purchase of other securities by them. For instance: the first transaction evidenced on the account shows the sale of $5,000 Tennessee Coal & Iron Firsts, realizing the sum of of $4,468.75. On the same day there were bought—

$3,000 Missouri, Kansas & Texas Firsts	$2,456.25
75 Shares of Northwestern	8,334.38
$500 Missouri, Kansas & Texas	410.63

For the difference between the proceeds received from the sale of the Tennessee Coal & Iron bonds and the purchase price of the securities bought a check was given by Greene to the brokers of $6,757.16. (See Exhibit 701.)

Another instance clearly showing other sources of income is shown by the transaction on May 21st, 1897.

On that day securities were sold for $80,850. Out of this amount there was turned over by check to the American Exchange National Bank $64,000, and there was paid to Greene a check to balance the account of $9,314.24, thus showing cash aggregating $73,314.24 as the proceeds of a single transaction. (See Exhibit 701.)

In addition, *interest* and *dividends* were being received on the securities purchased which also formed part of the account. (See Exhibit 701.)

These instances are typical of others appearing on the face of the accounts, and show ample sources other than the receipt of the alleged fraudulent moneys out of which the speculative account referred to could have been conducted.

Moreover, it specifically appears on the face of the account itself (Exhibit 701) that the Lee Livingston & Co. account was a purely speculative account and that the moneys paid by Greene were not for the purchases of the stocks shown thereon, but in discharge of his indebtedness to Lee, Livingston & Company for advances made by them to him on account of such purchases.

It is, of course, unnecessary to explain the nature of a purchase of securities on margin other than to say that in such a transaction stocks are bought and sold without the purchaser putting up the actual purchase price, but simply a so-called "margin" to protect the broker against loss on the transaction. IN THEORY AND IN FACT THE

MONEYS TO BUY THE SECURITIES ARE ADVANCED BY THE BROKER TO THE PURCHASER AND THE FORMER RETAINS THE SECURITIES PURCHASED AS COLLATERAL FOR HIS LOAN.

On a sale of the securities the purchaser is credited with the proceeds, and if the amount received is in excess of the purchase price a check for the difference is delivered to the purchaser as his profit. If, on the other hand, the price received is less than the purchase price, the difference is deducted from the margins deposited and charged to the purchaser as a loss.

The legal nature of the transaction is:

(a) A loan by the broker to the purchaser of the purchase price;

(b) The deposit by the purchaser with the broker of the securities purchased as collateral;

(c) The discharge of the indebtedness from the purchaser to the broker by the payment from the proceeds of sale of the loan made by the broker, and an accounting to the purchaser for the difference either as a profit or as a loss.

That this was the nature of the account of Greene with Lee, Livingston & Company specifically appears on the face of the account itself.

For instance: on the transaction of March 22nd, 1893, interest was charged by the brokers to Greene of $8.92 and $15.73; on the transaction of April 17th, 1893, interest was charged of $11.52 and $7.10; on the transaction of October 11th, 1893, interest was charged of $1.59; on the transaction of October 24th, 1893, interest was charged of $25.73; on the transaction of November 10th, 1893, interest was charged of $11.98; on the transaction of August 6th, 1897, interest was charged of $169.24; on the transaction of October 1st, 1897,

interest was charged of $521.42. (See Exhibit 701.)

All through the account these interest charges appear, those referred to being simply typical of the others.

These interest charges show that Lee, Livingston & Company were *advancing the moneys* to pay for the securities purchased. Besides, it clearly appears on the face of the account itself that securities were bought and sold without any delivery having been made to Greene. This is another fact which stamps the account as a speculative account on margin and not an outright purchase by Greene with his own moneys of the securities specified.

Such being the nature of the account, the securities clearly were purchased *by moneys belonging to Lee, Livingston & Company*, and the payments made from time to time by Greene were in discharge of his indebtedness to them for the advances so made.

THIRD: In order to follow trust funds fraudulently converted into other property it is necessary to prove that the identical trust funds passed into and became a part of the property claimed, and, if such funds become confused with other property so as not to be distinguishable, the equity is lost.

Peters *v.* Bain, 133 U. S., 607;
Schuyler *v.* Littlefield, 232 U. S., 701;
Board of Commissioners *v.* Strawn, 157 Fed. Rep., 49;
American Can Co. *v.* Williams, 178 Fed. Rep., 420;
In re A. O. Brown & Co., 189 Fed. Rep., 432, at p. 438;
In re Brown, 193 Fed Rep., 24, at p. 26.

In *Schuyler* v. *Littlefield* (supra) this Court, speaking by Mr. Justice Lamar as to the burden of proof and the necessity of showing with certainty that the specific moneys had gone into the securities claimed, said:

> "But the record fails to show when the $266,600 was deposited, and it also fails to show with the requisite certainty the particular use made by Brown & Company of that money. The banking transactions on August 24th involved several millions of dollars. Money was deposited by Brown & Company in the bank, and money was borrowed by Brown & Company from the bank. Part of the loans were deposited to their bank account, and a part, represented by cashier's checks, did not appear in that account. Money was paid by Brown & Company to outsiders and to the bank. Payments to the bank were made on account of notes, some of which represented loans appearing in the deposit account, and others represented loans which had not been so entered. Some of the loans were secured and others were unsecured, and whether the money received from Miller (which included the trust fund of $9,600) was used to pay the secured or unsecured loans does not appear with certainty.
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> * * *
>
> "They were practically asserting title to $9,600, said to have been traced into stock in the possession of the trustee. Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock, their claim must fail."

Schuyler *v.* Littlefield, *supra.*

In Peters *vs.* Bain (*supra*), the moneys of a national bank had been obtained and used in breach of trust by a firm of private bankers. Both failed. The receiver of the national bank sought to impress with a trust the entire property of the firm in the hands of its assignee, which had been "paid for by the firm out of the general mass "of money in their possession and which may or "may not have been made up in part of what had "been wrongfully taken from the bank." At the Circuit Court the claim of the receiver of the national bank was disallowed, and on appeal to the Supreme Court the judgment was affirmed, *Chief Justice Fuller* saying that "purchases made "and paid for out of the general mass cannot be "claimed by the bank unless it is shown that its "own moneys then in the fund were appropriated "for that purpose."

Peters *vs.* Bain (*supra*).

The decision in this case was cited with approval and followed by the Circuit Court of Appeals, Sixth Circuit in *Board of Commissioners* vs. *Strawn* (*supra*). In that case the cashier of a county national bank in Ohio at the time it went into the hands of a receiver was a deputy county treasurer and had for sometime previously been collecting taxes at the bank, which were deposited in the bank to the credit of the treasurer and mingled with the bank's funds. Neither of such officers had any power under the law to make such deposits nor to part with title to the money.

It was held that the county was only entitled to recover from the receiver as a part of the trust fund so much of the cash taken possession of by the receiver as equalled the lowest cash balance remaining in the bank at any time while the taxes were being collected, together with the

collections subsequently made, but that it could not recover the proceeds of commercial paper acquired by the bank during such time and collected by the receiver without establishing by proof that the tax money, or the fund in which it was mingled in fact, went into such paper. *Circuit Judge Lurton*, writing for the *Circuit Court of Appeals, Sixth Circuit*, said:

> "That the misuse of this trust fund has "gone to swell, in one form or another, the "general assets of the bank is not enough to "charge the whole with a lien, will not be "seriously contested. The cases which deny "such a contention are numerous. To im- "press a trust upon the property of a *tort* "*feasor* who has used the trust fund in his "private affiairs, it must be traced in its "original shape or substituted form."
>
> Board of Commissioners *vs.* Strawn (*supra*).

In *American Can Co.* vs. *Williams* (*supra*), the plaintiff sent certain drafts attached to bills of lading to a bank for collection and remission of proceeds. Some of the drafts were paid to the bank by the drawees' checks on outside banks, made payable to the collecting bank, and subsequently paid to it or, after its insolvency, to defendant as receiver. Others were paid by the drawees' checks on outside banks payable to the collecting bank and endorsed and delivered by it to its New York City correspondent and credited by the latter to the collecting bank. It was admitted that the assets of the collecting bank which came into defendant's hands as receiver exceeded the amount of plaintiff's claim, but it was not shown that the money represented the proceeds of any of the drafts, except those paid to the re-

ceiver and a small balance of the proceeds of a check on an outside bank with which one of the drafts was paid, which check was credited to the collecting bank in its account with the drawee of the check.

It was held by the *Circuit Court of Appeals, Second Circuit*, that the claimant had only succeeded in tracing so much of the proceeds of the drafts as represented the amount so paid to the receiver, as to which only it was entitled as a preferred claim. In the opinion, which was written by *Circuit Judge Noyes*, the opinion in *Board of Commissioners* vs. *Strawn* (*supra*) was referred to with approval, and the Court said:

> "The stipulation of facts states merely that "the 'assets' of the bank prior to the receiver- "ship, and which came into the receiver's "hands, exceeded the amount of the plain- "tiff's claim. No basis whatever is fur- "nished for tracing the misappropriated "moneys into the hands of the receiver, or "for holding that they were converted into, "or commingled with, any other property or "funds in his possession. It is not shown "what the assets of the bank consisted of. "It may be that the only assets which the re- "ceiver obtained were notes and bills re- "ceivable—or, perhaps, its banking house— "which belonged to the bank before the trans- "actions in question took place. It may be "that prior to the receivership the bank "used the trust funds to pay its debts with. "*It may be that these funds were wholly dis- "sipated.* There is absolutely nothing to "show that they had any connection with any "of the property which came into possession "of the receiver. The stipulation of facts "is wholly insufficient to show any identity "of the property followed with the funds "sought to be charged against it or to show "that the amount of such property was in-

"creased or augmented by such funds. "Indeed, the negative is not shown. *It does "not appear that if there had been no mis- "appropriated moneys the assets of the bank "would have been less.* While the right to "follow misapplied moneys as trust funds "into the hands of a receiver has been ex- "tended in the modern decisions, there has "never been in the federal courts a departure "from the principle that there must be some "identification of the property followed with "the trust funds. Some of the latest cases "say that it is sufficient to show that the prop- "erty in the possession of the receiver has "been increased or augmented by the trust "funds. But that is only a different way of "stating the earlier rule. It cannot be shown "that property in the hands of a receiver has "been increased by trust funds unless it is "shown that they were converted into or com- "mingled with it. If the plaintiff's conten- "tion be well founded, and to follow misap- "propriated moneys it is only necessary to "show that *a receiver has*, and that the "*trustee had*, assets, the rule is simply that "a demand for such moneys is a preferred "claim against any substantial estate. To "adopt this view is to do away with all the "equitable principles out of which the right "to follow trust funds grew."

American Can Co. *vs.* Williams (*supra*).

The case last cited is particularly applicable to the facts in the case at bar. By the evidence adduced it was not shown that the moneys alleged to have been fraudulently received by Greene were *the* moneys which were used for the purchase of the securities in question. On the contrary, the proof shows that the funds with which they were purchased might have derived *from other sources*. To hold that because of the mere fact that trust funds had been diverted a trust was

impressed *on the general property of the alleged wrongdoer*, without showing that the funds fraudulently acquired went directly into such property, would be, as said by *Judge Noyes* in the case last quoted from, "to do away with all the "equitable principles out of which the right to "follow trust funds grew."

POINT III.

The defendant Kellogg, as trustee, is in any event a *bona fide* owner in good faith of the securities claimed with an equity therein prior to any claim of the United States.

FIRST: There were at first deposited with Mr. Kellogg 300 shares of the stock of the Delaware, Lackawanna & Western Railroad Company on December 14th, 1899, and upon the deposit being made, he wrote a letter to Leary stating that Greene had placed in his hands as indemnity "to "you for becoming his bondsman in the matter "of the United States *vs.* Greene, Gaynor and "others now pending in the District Court, three "hundred shares of the capital stock of the Dela- "ware, Lackawanna & Western Railroad Com- "pany. It is understood that I am to hold these "until you are released from the said bond, or in "case that your liability should be established, that "it is to be applied in payment of your obliga- "tion." (See Record, p. 67.)

In a letter written on January 19th, 1900, the letter of December 14th, 1899, was sent to Leary, it having been held by Kellogg awaiting a call for it by Leary. (See Letter, Record, p. 66.)

On May 21st, 1901, a further letter was written by Mr. Kellogg to Leary, stating that it would be necessary to renew the bail given by him for Greene "and for which I hold the security for "your protection," and asking him to call at the office for that purpose, and further stating that "this new bond is to take the place of the old one "without additional liability." (See Letter, Record, p. 67.)

On June 6th, 1901, a letter was written by Mr. Kellogg to Leary to the effect that he was again obliged to trouble him to renew the bond in the Greene matter, and asking him to be in Court on Saturday morning between ten and half-past ten. (See Letter, Record, pp. 67-68.)

In the affidavit of Mr. Kellogg, which under stipulation it was agreed should be considered as testimony given by him on the trial, he specifically swore:

> "That the securities described in the paper "writing dated December 14th, 1899, in form "of a letter addressed by deponent to James "D. Leary, copied into deponent's amended "answer filed in this cause on October 14th, "1913, to wit: 300 shares of Delaware, Lack- "awanna & Western Railroad Company stock, "were left with deponent by said B. D. Greene "at the time for the purpose in said letter "stated, and also to secure deponent and his "firm for the fees and disbursements that "might be incurred by deponent in defend- "ing said Greene or in caring for his interests "in any proceedings brought by the United "States against said Greene, or in any other "matters, there being several matters in liti- "gation in which said Greene was interested "pending in deponent's office."
>
> See Affidavit Luther Laflin Kellogg, Record, pp. 71-72.

This evidence was in no way controverted, and conclusively shows that on December 14th, 1899, Mr. Kellogg received from Greene the securities referred to, for the express purpose of indemnifying Leary against liability on the bail bond executed by him for Greene, and Mr. Kellogg's firm for services to be rendered and disbursements to be incurred in defending Greene against the accusation made against him and other litigation in which he was interested.

And this was the view of the Court below. In the opinion of the CIRCUIT COURT OF APPEALS it was said:

> "That some contract was made for the protection of Leary can hardly be denied. The Kellogg letter of December 14, 1899, admits of no other explanation. It shows that a specified security was placed by Greene in the hands of Kellogg for the express purpose of indemnifying Leary against liability as Greene's bondsman in the matter therein mentioned, 'the matter of the United States against Greene.' True, it says that the stock described is to be held 'until you are released from the *said* bond,' which was the bond that day executed. But in view of what followed is it not quite reasonable to suppose that these words expressed the full extent and purpose for which the stock was placed in Kellogg's hands? Plainly the 'matter' referred to was the removal of Greene from New York, where he was arrested, to the Southern District of Georgia, to answer an indictment there found against him; and it is undeniable that all the bonds signed by Leary, including the one forfeited, were given at various stages of the removal proceedings, and that all of them had reference to his appearance for trial in the district where he was indicted. They were different parts, so to speak, of a single transaction. It is therefore difficult to

believe that the indemnity promise was intended to be limited to the first obligation. Kellogg evidently had no such understanding when he wrote Leary on the 21st of May, 1901, more than five months later that it would be necessary for him 'to *renew* the bail given by you for Captain Greene, and for which I hold the security for your protection,' and closed his letter by saying, 'this bond is to take the place of the old one without additional liability.' This is a clear declaration that the security he held would cover the renewed obligation, and we do not see that anything else can be made of it."

(See Opinion, KNAPP, CIRCUIT JUDGE, p. 148.)

SECOND: That the securities were received in absolutely good faith and without any notice of any flaw or taint in their title or any fraud in their acquisition, Mr. Kellogg expressly swore:

"That at the time of the institution of the "proceedings by the United States against "said Greene, based on the alleged fraudu-"lent transactions referred to in the bill here-"in, viz: in December, 1899, and on December "14th, 1899, when there was deposited with "him certain securities, deponent had no "knowledge of the sources from which said "securities were acquired, other than the fact "that they were turned over to deponent by "said Greene as the owner thereof. THAT "SAID SECURITIES WERE RECEIVED BY DEPONENT "IN ABSOLUTE GOOD FAITH AND WITHOUT SUSPI-"CION OR NOTICE OF ANY FLAW OR TAINT IN THEIR "TITLE, OR OF ANY FRAUD IN THEIR ACQUISITION, "OR OF ANY ADVERSE CLAIM WHATSOEVER."

See Affidavit Luther Laflin Kellogg, Record, p. 71.

NO EVIDENCE IN ANY WAY CONTROVERTING THE TESTIMONY OF MR. KELLOGG WAS ADDUCED BY THE UNITED STATES, AND THE ONLY CLAIM MADE IS THAT BECAUSE OF HIS RELATION AS ATTORNEY TO GREENE, MR. KELLOGG MUST HAVE HAD NOTICE OF THE ALLEGED FRAUD.

As to his connection with the proceedings instituted by the United States against Greene and his belief in Greene's innocence, Mr. Kellogg swore:

> "That in the proceedings instituted by the "United States, deponent did not personally "represent said Greene as counsel, nor did "he represent those claimed to have been as- "sociated with him in the fraudulent acquisi- "tion of moneys from the Government, but "in said proceedings said Greene and those "associated with him were represented by "deponent's partner, Mr. Abram J. Rose, and "deponent had no personal knowledge of the "facts disclosed by said proceedings and took "no part therein, except on one occasion "when he took part in the examination of "one Robert F. Westcott, a witness examined "therein, which examination took place on "or about August 10th, 1900.
>
> "THAT AT THE TIME OF THE RECEIPT OF SAID "SECURITIES AND DURING THE PENDENCY OF THE "PROCEEDINGS INSTITUTED BY THE UNITED "STATES, SAID GREENE DENIED HE HAD BEEN "IN ANY WAY GUILTY OF ANY FRAUD IN CONNEC- "TION WITH THE MATTER REFERRED TO IN THE "COMPLAINT, AND DEPONENT SO BELIEVED AND "NOW BELIEVES."
>
> See Affidavit Luther Laflin Kellogg, Record, p. 71.

There was thus direct and complete proof showing at the time of the deposit of said securities Mr. Kellogg received the same in absolute good

faith and without any notice of the fraud alleged, and the mere fact that the relation of attorney and client existed between him and Greene did not charge him with notice of their fraudulent acquisition.

Evans *vs.* Mansur & Tebbetts Implement Co., 87 Fed. Rep., 275.

In that case it was held by the CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, that where one who was doing a large business and was considered solvent and prosperous borrowed money at a time when his financial affairs were hopelessly involved and only two days before executing a trust deed of all his property, the fact that the lender was and had been for several years the borrower's attorney and already held his note, long overdue, for borrowed money, and that he drew up the deed of trust under which he was one of the preferred creditors only two days later, were not proof that the lender knew of the borrower's financial condition when he made the loan or that he was a party to the fraud when such knowledge and complicity were denied by him. In the opinion it was said:

> "There is no proof that the intervenor "knew of the conveyances of property, or "that notes of Dupree, to a large amount, "were held by the banks. Even under the "restricted charge made in the brief for com- "plainants, there is no proof that the inter- "venor knew of any circumstances which "could fairly put him upon inquiry as to Du- "pree's condition or intentions. It is urged "upon us by the complainant's counsel that "it is incredible that Evans, as Dupree's at- "torney, did not know Dupree's financial con- "dition. This would appear to mean that al- "though both the intervener and Dupree (the

"latter being complainant's witness) swear "that the intervener did not know of Dupree's "condition, and although their testimony con- "tains no internal indication of untruth or "incorrectness, and is consistent with the "other evidence in the cause, yet we should "wholly disbelieve it, virtually, on the ground "that it is impossible that an attorney should "not know the financial condition of his client. "This apparently amounts to saying that "there is an irrebuttable presumption in such "a case. Of course, we cannot agree to such "doctrine. The banks which held Dupree's "commercial paper for collection, and his "other debtors, had no distrust of him. He "was evidently doing a large and extensive "business, and was considered a prosperous "and abundantly solvent business man. But, "after Dupree's insolvency was discovered "(to the surprise of all who had dealt with "him), the complainants seem to have as- "sumed and taken for granted that the in- "tervener necessarily knew Dupree's condi- "tion, merely because he was Dupree's at- "torney. Under all the proof before us, we "find in this matter nothing more tangible "than a suspicion created merely by the rela- "tion between the parties. Complainant's "counsel concede in their brief that the in- "tervener is a reputable attorney, in good "standing, and they do not charge him with "giving false testimony. Yet, even under "the restricted contention that the intervener "was put upon inquiry, it is plain, in view of "the intervener's testimony, that we could "not decree against him without finding his "testimony false."

Evans *vs.* Mansur & Tebbetts Implement Co. (*supra*).

In the case at bar Mr. Kellogg, against whom no charge is made of false swearing, and who, it will undoubtedly be conceded, is a reputable at-

torney, expressly denied that he had any knowledge whatsoever of the charge made against Greene and that from his previous connection with him he believed him to be a man of large financial resources and fully able to purchase the stock in question.

To hold in the face of Mr. Kellogg's denial that he had notice would be to charge him with the giving of false testimony, and this charge would be based on the mere presumption that because of his relation as attorney for Greene he must have known that a fraud had been perpetrated—an altogether unreasonable assumption.

And this was the view of the Court below:

> "The first bond signed by Leary was on the 14th of December, 1899, and we think it must be held that neither Leary nor Kellogg then knew or had reason to believe that the securities which Greene placed in Kellogg's hands about that time were not honestly acquired. It is not claimed that Leary had any knowledge or even suspicion of Greene's misconduct, and the only ground upon which knowledge is sought to be imputed to Kellogg is the fact that he was Greene's attorney. But this of itself is not enough to justify the inference that he either knew or ought to have known that the securities which Greene turned over to him were the fruits of criminal wrongdoing. The presumption is to the contrary. *Evans* v. *Mansur & Tebbetts Implement Co.*, 87 Fed. 275. Especially is this so since it appears that Kellogg had no personal connection with the defense of Greene in the criminal proceedings instituted against him until long after the transfer of the securities in question. Moreover, Kellogg meets the implication that he was cognizant of Greene's fraudulent conduct with explicit and positive denial. In an affidavit of October 27, 1913,

received under stipulation as testimony, he says:

"'*That at the time of the institution of the proceedings by the United States against said Greene, based on the alleged fraudulent transactions referred to in the bill herein, viz: in December, 1899, and on December 14th, 1899, when there was deposited with him certain securities, deponent had no knowledge of the sources from which said securities were acquired, other than the fact that they were turned over to deponent by said Greene as the owner thereof. That said securities were received by deponent in absolute good faith and without suspicion or notice of any flaw or taint in their title, or of any fraud in their acquisition, or of any adverse claim whatsoever.*

* * * * * * * *

"'*That at the time of the receipt of said securities and during the pendency of the proceedings instituted by the United States, said Green denied he had been in any way guilty of any fraud in connection with the matters referred to in the complaint, and deponent so believed and now believes.*'"

"In this affidavit he further states with some detail the circumstances of his acquaintance and professional employment by Greene, the enterprises and litigation in which Greene was engaged, with other facts tending to show that Greene was a man of standing and importance in the business world and possessed of considerable means. These statements are in no wise contradicted and they indicate that Kellogg was warranted in assuming without question that the securities turned over to him had been honestly acquired by Greene in business transactions with which the Government was not concerned, and that his ownership of the same was free from suspicion. In short, the evidence fails to sustain the Government's contention respecting Kellogg's knowledge, and it must therefore be held that

he came into possession of the securities in question without reason to suspect that they had been purchased with stolen money."

(See Opinion, KNAPP, CIRCUIT JUDGE, Record, pp. 145-146.)

THIRD: Said securities having been deposited with Mr. Kellogg, as trustee, in good faith for a specific purpose and without notice of any flaw in Greene's title thereto an equitable lien was created thereon in his favor, as Trustee, superior to any claim of the United States.

Walker *v.* Brown, 165 U. S., 654;
Fourth Street National Bank *v.* Yardley, 165 U. S., 635;
Hauselt *v.* Harrison, 105 U. S., 401;
Ingersoll *v.* Coran, 211 U. S. 335;
Ketchum *v.* St. Louis, 101 U. S., 306.

In Walker *v.* Brown (*supra*), a letter had been written by the owner of certain bonds to a creditor stating that he had loaned the bonds to a debtor with the understanding that any indebtedness that might be owing to such creditor at any time should be paid before the return of the bonds or their value to the owner.

MR. JUSTICE WHITE, holding that an equitable lien on the bonds was created by the letter referred to, said:—

"Pomeroy in his Work on Equity Jurisprudence (Vol. 3, paragraph 1235) condenses and states the general result of the authorities on the subject, as follows: 'The 'doctrine may be stated in its most general 'form that every express executory agreement in writing, whereby the contracting 'party sufficiently indicates an intention to 'make some particular property, real or 'personal, or fund, therein described or 'identified, a security for a debt or other 'obligation, or whereby the party prom-

"'ises to convey or assign or transfer the "'property as security, creates an equitable "'lien upon the property so indicated, which "'is enforceable against the property in the "'hands, not only of the original contractor, "'but of his heirs, administrators, execu- "'tors, voluntary assignees, and purchasers "'or encumbrancers with notice. * * * ' "TO DEDICATE PROPERTY TO A PARTICULAR PUR- "POSE, TO PROVIDE THAT A SPECIFIED CREDITOR "AND THAT CREDITOR ALONE, SHALL BE AUTHOR- "IZED TO SEEK PAYMENT OF HIS DEBT FROM "THE VALUE OF THE PROPERTY OR ITS VALUE, IS "UNMISTAKABLY TO CREATE AN EQUITABLE "LIEN."

Walker *vs.* Brown (*supra*).

The principles announced in the cases referred to are directly applicable here. The securities were expressly dedicated to the payment of particular obligations, *i. e.*, the indemnification of Leary against loss or liability by reason of his becoming bail.

And this was the effect given to the deposit by the learned Court below.

> "Nor does it appear to us doubtful that the Norfolk & Western stock, which stands in the name of Kellogg, constitutes the trust fund from which Leary's estate may claim reimbursement. Kellogg says that Greene reserved the right to exchange the securities he transferred, and that the Norfolk & Western stock was in fact substituted for the D. L. & W. stock originally deposited. If the stock first placed in Kellogg's hands was impressed with a trust in favor of Leary, the stock that replaced it became impressed with the same trust when the substitution took place, because it was then set apart and pledged for the protection of Leary."
>
> "Of the contention that Mrs. Leary's claim rests wholly upon an implied promise the Supreme Court said:

"We lay on one side the suggestion that the intervention goes only upon an implied contract in its proper sense of an obligation raised by the law irrespective of any real promise. That would seem to us a perverted interpretation of the words 'upon the understanding and condition' even if the contract were only a general one to indemnify, but a contract that certain specific stock in the hands of a trustee should be held as security for a specific contingent claim could not exist unless it was express. It would be none the less express if it was conveyed by acts importing it than if it was stated in words.

"The case presented by the record is surely not wanting in proof of a 'real promise,' Kellogg's letter of December 14, 1899, says in so many words that Greene had placed three hundred shares of D. L. & W. stock in his hands to indemnify Leary as bondsman for Greene, and this of itself is ample evidence of an express contract. The only subject of question is the scope and extent of the contract actually made. That it covered the bond of January 20, 1902, and was so intended, seems established with reasonable certainty by the written declarations of Kellogg, by the nature of the situation in which the parties were placed, and by the unmistakable import of their acts.

"We are therefore constrained to hold, taking all the facts and circumstances into account, that the stock which Greene turned over to Kellogg was intended to be a continuing security for the protection of Leary as the bondsman of Greene in the removal proceedings, and that it constituted an indemnity fund not only for the prior bonds which were exonerated, but for the final obligation under which his estate has been compelled to pay the judgment in favor of the United States."

See Opinion KNAPP, CIRCUIT J. (Record, pp. 149-150.)

POINT IV.

The trustee is entitled to just and proper compensation for his services and an allowance for counsel fees and disbursements in the care, custody and defense of the trust fund prior to the claim of the United States thereon.

FIRST: Since December 14th, 1899, a period of nearly 20 years, Mr. Kellogg has acted as trustee of the fund in question. Since 1903, a period of 14 years, the right to the payment of the trust fund has been involved in litigation which necessitated the defense of the suit itself, the argument of a motion for a preliminary injunction, and of appeals both to the Circuit Court of Appeals and to this Court.

These proceedings necessitated the employment of counsel and attendance before the DISTRICT COURT at Lynchburg, Virginia, and before the CIRCUIT COURT OF APPEALS for the FOURTH CIRCUIT, and before this Court.

In the preparation and trial of the case and in the argument of the appeals voluminous briefs were also prepared and submitted.

This litigation is not of the trustee's seeking, and he has been compelled to defend the trust against the claims of rival claimants.

His defense of the fund has not been for his own personal benefit, but for the benefit of the one ultimately adjudged entitled thereto.

Under such circumstances an allowance to cover his reasonable expenses, including a reasonable counsel fee, is clearly required as a matter of equity and justice.

The question of the right of the trustee to receive compensation and an allowance for counsel

fees and expenses in protecting the trust was left entirely open and undecided by the Court below on the assumption evidently that when the case was remanded to the DISTRICT COURT for further proceedings in accordance with the opinion, the question as to compensation would be then decided by the DISTRICT COURT. JUDGE KNAPP in his opinion said:

> "Indeed it is inferable from the record as we understand it, that Kellogg does not now assert any personal claim to the fund in litigation, EXCEPT PERHAPS FOR SUCH SUM AS HE MAY ASK TO HAVE ALLOWED FOR COUNSEL FEES AND EXPENSES IN PROTECTING THE TRUST."
>
> Opinion, KNAPP, CIRCUIT JUDGE, Record, p. 148.

SECOND: **That a trustee is entitled to compensation where he has faithfully discharged his duties and to the repayment of expenses incurred in the defense of his trust is beyond question and no express agreement or stipulation that he shall have compensation is necessary.**

In the American & English Encyclopaedia of Law, Volume XXVIII, page 1033, the rule is stated in the following words:

> "Although formerly this doctrine (the English doctrine that a Trustee was not entitled to compensation in the absence of an express agreement) was and at the present time is, in the absence of Statutes, followed in some states, yet, now in America and Canada generally a Trustee, in the absence of any agreement or stipulation therefor, is allowed compensation by the Court where he has faithfully discharged his duties."
>
> American & English Encyclopaedia of Law, Volume XXVIII, page 1033.

The right of a trustee to compensation is also expressly recognized by the Federal Courts.

As early as 1853, in BARNEY *v.* SAUNDERS (16 Howard, 535), the Supreme Court refused to recognize the rule of the English Courts, and announced the right of a trustee to just and reasonable compensation.

MR. JUSTICE GRIER, writing, said:

> "In England, Courts of Equity adhere to the principle which has its origin in the Roman law 'that a Trustee shall not profit by his trust,' and therefore that a Trustee shall have no allowance for his care and trouble. A different rule prevails, if not universally, in this country. Here it is considered just and reasonable that a Trustee should receive a fair compensation for his services; and in most cases it is gauged by a certain percentage on the amount of the estate."
>
> Barney *v.* Saunders (*supra*).

The rule of compensation was also expressly recognized and applied by the Circuit Court for the Southern District of New York in

> Dow *v.* Memphis & Little Rock R. R Co., 23 Blatchford Circuit Court Reports, p. 84.

JUDGE WALLACE said:

> "The trustees are entitled to reasonable compensation for their services in defending the suit brought to set aside the mortgage and protect the rights of the bondholders. * * *"
>
> Dow *v.* Memphis & Little Rock R. R Co., (*supra*).

In both the States of Virginia and New York the English doctrine is also repudiated, and a trustee is held to be entitled to just compensation for services rendered and reasonable expenses incurred.

In Virginia, in Miller *v.* Beverlys, 4 Hen. & M., 415, it was said:

> "The English books lay it down that regularly a Trustee is not to have anything for his own labour and pains though they admit that even there some have thought this a great hardship. It is true we have adopted the principles of the English law in many respects so far as they are not incompatible with the principles of our own Government, but we have not by that adopted indiscriminately all their decisions; and whatsoever may be my respect for them as having been delivered by able judges, yet I must do here, as they sometimes do there, that is to say, reject those decisions which do not conform to the standard of that justice which commands us to live honestly, hurt nobody, and render everyone his due.
>
> "Those who laid down the rule there that a Trustee should not have anything for his own labour and pains seem to have done it without regard to that simple principle, but of unerring truth, that the labourer is worthy of his hire; and hence it might well have been thought a hardship, even in that country where so monstrous a rule was suffered to obtain; it certainly has never taken foothold in our country, but if it has, so far as I can go, I shall blot it out forever."
>
> Miller *v.* Beverlys (*supra*).

While, so far as ascertained, in Virginia there is no express statute on the subject, in New York there is a direct statute fixing the compensation of the Trustee of an express trust.

By §3320 of the New York Code of Civil Procedure, it is provided:

> "A Trustee of an express trust is entitled, and two or more Trustees of such a trust fund are entitled to be apportioned between or among them, according to the services rendered by them respectively as compensation for services as such, over and above expenses, to commissions as follows: For receiving and paying out all sums of principal not exceeding $1,000 at the rate of five per centum. For receiving and paying out any additional sums of principal not exceeding $10,000 at the rate of 2½ per centum. For receiving and paying out all sums of principal above $11,000 at the rate of one per centum. And for receiving and paying out income in each year at the like rates. In all cases a just and reasonable allowance must be made for the necessary expenses actually paid by such Trustee or Trustees."
>
> See New York Code of Civil Procedure, §3320.

Under this section it has been decided by the Court of Appeals of New York that compensation is to be computed upon the value of the securities held in trust, and is not in any way confined to the receipt and payment of moneys only.

> Robertson *v.* De Brulatour, 188 N. Y., 301.

Therefore, by custom and usage in Virginia, and by express statute in the State of New York, just and reasonable compensation to a Trustee for his services and necessary expenses is expressly authorized.

Whether, then, we apply the rule of Virginia, the *lex loci rei sitae*, or the law of New York, the

lex loci contractus, the defendant Kellogg as trustee, is clearly entitled to compensation for his services and reimbursement for expenses and disbursements incurred.

THIRD: The amount of the compensation should be fixed at the rate of 5 per cent. on the principal of the trust fund involved, together with a reasonable allowance for counsel fees and reimbursement for the disbursements incurred.

In the State of Virginia there does not seem to be any Statute definitely fixing the amount of compensation to be awarded, and it has been held that it is a matter wholly in the discretion of the Court, and may be anywhere between five and ten per cent. of the value of the trust fund, or in special circumstances, less or more than such amounts.

> Boyd *v.* Oglesby, 64 Va. (23 Grattan), 674.

In Miller *v.* Beverlys, (*supra*), it was held that five per cent. was a reasonable and just allowance.

On the question of the amount of compensation to be awarded, it was said:

> "This brings me to the question what commission should be allowed; and I am of opinion that the same rule which the Court laid down in the case of Granbury before mentioned should be laid down in this case, and that was to allow a commission of five per cent. which should be allowed for risk, trouble and such expenses about the trust as were incurred within the course of the trustee's own business; but when he is taken out of that course upon the subject of the trust he should also have such expenses allowed as are reasonable."
>
> Miller *v.* Beverlys, (*supra*).

In New York, however, under the Statute, the allowance would be at the rate of five per cent. on the first $1,000, two and one-half per cent. on the next $10,000, and one per cent. on the balance.

See New York Code of Civil Procedure, §3320.

In Dow *v.* Memphis and Little Rock Railroad Company, the amount allowed was only one per cent., and an additional sum as counsel fees and for disbursements.

The amount involved in that case, however, was $2,600,000 of bonds, and the allowance of one per cent. amounted to the sum of $26,000, which under the circumstances was deemed reasonable compensation.

Dow *v.* Memphis and Little Rock R. R. Co. (*supra*).

In the case at bar, the trust fund is claimed by rival claimants, the United States claiming the whole of the fund as proceeds of money fraudulently obtained from it, and the defendant Leary, as Administratrix, claiming part of the fund as indemnity to her decedent against liability as bail for the defendant Greene.

The questions raised involved an examination of voluminous facts, and the application of somewhat intricate and involved questions of law.

Taking into consideration the amount of work involved, the value of the subject matter, the experience and standing of counsel, it is submitted a reasonable compensation to the trustee would be five per cent. of the principal of the trust fund, besides a reasonable allowance for counsel fee, and to cover necessary disbursements.

Randall *v.* Packard, 142 N. Y., 47; at p. 56.

POINT V.

The judgment of the Circuit Court of Appeals should be affirmed and the cause remanded to the District Court with directions to ascertain the amount due to the administrators of James D. Leary, deceased, and the allowance to be made to the appellee, Kellogg, as compensation for his services, as trustee, and to cover the expenses and disbursements incurred by him in the defense thereof, and for the payment of said sums when ascertained, prior to the payment to the United States; or, in the alternative, the appeal should be dismissed with directions to proceed in accordance with the opinion of the Circuit Court of Appeals.

ABRAM J. ROSE,

ALFRED C. PETTÉ,

Counsel for Luther Laflin Kellogg as Trustee, Appellee.

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Supreme Court of the United States

October Term, 1917

No. 194

(October Term, 1916—No. 527)

THE UNITED STATES, APPELLANT,

v.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS OF JAMES D. LEARY, DECEASED, LUTHER LAFLIN KELLOGG, AND THE NORFOLK & WESTERN RAILWAY COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

RIGHT RESERVED

By an order of this Court entered April 10, 1917, this cause was advanced and assigned for hearing on October 2, 1917.

It is now September 22, 1917, and neither the above-named Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, appellees, nor their counsel have received or been served with a brief or printed argument for the United States, appellant, upon this appeal, nor has such brief or argument so far as the undersigned are advised been filed with the Clerk of the Court, as required by its rules, to-wit:

Rule 21, Clauses 1, 5, and 7.

The argument herewith below has thus perforce been prepared without having the benefit of having before the undersigned the brief for the appellant as contemplated by the Rules of the Court.

The said administrators of James D. Leary, deceased, in tendering this brief of their counsel herewith below, hereby expressly reserve the right to move to dismiss this appeal because of the said appellant and its counsel failing to serve and file brief or printed argument, as required by the Rules of the Court.

If such motion, the right to make which is not hereby waived, shall be made and overruled, the following brief for the said appellees is offered:

BRIEF FOR DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS OF JAMES D. LEARY, DECEASED, APPELLEES.

STATEMENT

This case is before this Court for the second time. It was first here upon the pleadings. It is now here upon the merits.

The previous rulings both here and in the courts below, so far as reported, may be found as follows:

United States v. *Greene* (Circ't C'rt), 163 Fed. Rep. 442.

Leary v. *United States* (C. C. A.), 184 Fed. Rep. 433.

Leary v. *United States*, 224 U. S. 567.

Leary v. *United States* (C. C. A.), 229 Fed. 660.

The present appeal draws in question a contract to indemnify the surety upon a bail bond, and the disposition of the pledged securities to which conflicting equitable claims are asserted in this suit.

To the extent that they affect the intervening administrators of the Leary estate, appellees, the issues now here arose and have progressed towards determination in the following way:

On the 8th day of December, 1899, the Grand Jury in the United States District Court for the Southern District of Georgia returned a true bill of indictment against Benjamin D. Greene, John F. Gaynor, and others, charging them with conspiracy to defraud the United States.

On December 14, 1899, the said Greene was arrested in New York City on a warrant issued by John A. Shields, United States Commissioner for the Southern District of New York, based upon said indictment and affidavit thereto. (Record, pp. 31, 32, and 80.)

The said Benjamin D. Greene was then held in bail for appearance before Commissioner Shields from time to time.

Thereupon, the said Greene arranged to have James D. Leary, a friend and client of Luther Laflin Kellogg, of the firm of Kellogg & Rose, attorneys for Greene, become his bondsman, and said Leary consented to become bondsman for the

said Greene in the said removal proceedings, upon the understanding and condition that the said Greene should deposit with the said Kellogg, and that the said Kellogg should hold as security for the indemnification of the said [redacted], 300 shares of stock of the Delaware, Lackawanna & Western Railway Company, which shares of stock were deposited with the said Kellogg for the said purpose on the same day the aforesaid bond of December 14, 1899, was executed by Leary. Afterwards 400 shares of stock, of the Norfolk & Western Railway Company, were substituted in lieu of the said D. L. & W. stock to be held by Kellogg upon the same terms and conditions. (Rec., pp. 56, 52, and 70.)

These shares of Norfolk & Western Railway Company stock, with accrued dividends, constitute the fund in controversy in this suit.

The removal to Georgia was contested by Greene and pending the removal proceedings his bail was several times renewed in varying amounts, James D. Leary continuing as surety until the final bond of January 20, 1902, in the penalty of $40,000 was given with the said Leary as surety for the appearance of Greene in Georgia in consummation of the said removal proceedings.

Greene forfeited this said $40,000 bond, and after litigation, the United States finally obtained judgment against the Leary estate (the said James D. Leary having died April 11, 1902), upon this bond in New York, for $35,377.00 on January 6, 1908 (Rec., pp. 75 and 84). Thereupon, Mrs. Mary C. Leary, widow and administratrix of the said James D. Leary, applied to Kellogg for the securities constituting the indemnity fund, and referred to in certain letters from the said Kellogg to Leary found in the papers of the said Leary. These letters appear in the record, and will be hereinafter again referred to and set out. (Rec., pp. 109, 113, 114, and 115.)

Being informed that the said securities were impounded and the said Kellogg enjoined by an order of the United States

Circuit Court for the Western District of Virginia at Lynchburg, Va., Mrs. Leary had prepared and offered on April 17, 1908, her bill of intervention in this said cause of the *United States* v. *Benjamin D. Greene and Others*, then pending in the said court for the Western District of Virginia.

In the said cause, theretofore and thereafter, the following proceedings were had:

On December 19, 1903, the United States of America filed its bill against Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk & Western Railway Company to subject to the claims of the United States 400 shares of stock of the Norfolk & Western Railway standing in the name of Kellogg, on the ground that the said stock had been purchased with funds of which Greene had defrauded the United States, of which fraud it was alleged Kellogg had full notice. (Rec., pp. 11 to 38.)

Greene made no defence, and a decree *pro confesso* was taken against him. (Rec., p. 3.)

The Railway Company answered the bill, admitting that 400 shares of its stock had been issued to Kellogg and stood in his name on the books of the Company, and submitting itself to such order or decree as to the Court might seem meet.

Kellogg demurred to the bill (Rec., p. 39) and, not waiving his said demurrer, filed a sworn answer, paragraph 1 of which was in these words:

> "1. That this answer is made under oath and is intended at once as an answer, and in season as an affidavit in any sort of proceedings." (Rec., p. 42.)

In the affidavit attached to the said answer, which affidavit was duly subscribed and sworn to by Kellogg, it was further recited that the answer was "also in the form of an affidavit for use in the said cause" (Rec., p. 53).

In the stipulation embodied in the record it is stated (p. 3) that the defendant Kellogg filed a demurrer to the bill and

also filed and offered his "affidavit in the nature of an answer" to the averments of the bill.

Testimony was taken and certain stipulations were made and filed.

Under a stipulation between the solicitor for the United States and the solicitor for Kellogg, the depositions of Kellogg himself and Franklin Nevius were taken. These depositions, reduced to narrative form, are copied in the record (pages 118 to 121).

On December 21, 1905, the United States and the defendant, Kellogg, by their solicitors, entered into two stipulations endorsed respectively, "First Stipulation as to Certain Evidence, December 21, 1905," and "Second Stipulation, December 21, 1905, as to Certain Evidence." The first stipulation appears in the record on pages 121 to 125, and the second stipulation on pages 126 to 129.

Among other things, it was stipulated with reference to an item appearing in "Exhibit F" with the original bill, to-wit: Item of March 23, 1900, purchased by A. W. Kilbourne & Co., in account kept in the name of L. L. Kellogg, 1,000 shares of Canada Southern stock, $51,775, that the said shares were delivered by Kilbourne & Co. to Kellogg, and by Kellogg to Greene, and that the United States made no claim against Kellogg in connection with this transaction. It was further stipulated with reference to Item of March 26, 1900, purchase by Kilbourne & Co., in account kept in the name of Kellogg, 500 shares of Norfolk & Western Railway Company stock, $18, $12.50, that certificates for 400 shares of this stock were still in the possession of Kellogg, being the stock constituting the subject matter of this suit; and, as to the remaining 100 shares, that the same were sold on September 10, 1903, through certain brokers in an account kept in the name of F. Nevius, and the proceeds thereof went into the account in the name of Nevius for the benefit of Greene, and that this account was closed on that day (September 10, 1903) by the payment to Nevius or Kellogg of $11,447.48. The further

disposition of the proceeds of the 100 shares was not covered by the stipulation, but is fully explained in the depositions of Kellogg and Nevius (Rec., pp. 118 to 121); the explanation being that the $11,447.48 was paid over to Greene.

By the second stipulation (Rec., pp. 126 to 129) it was agreed between the solicitor for the United States and the solicitor for Kellogg that the copy of the record and testimony of witnesses on behalf of the United States, taken on proceedings before Commissioner Shields for the removal of Greene from New York to Georgia, "certified by the Commissioner and identified by the signatures of the solicitors," together with certain exhibits, should be considered as offered in evidence on behalf of the United States and as if taken under examination and cross-examination before an examiner in this cause, subject to all objections to the admissibility or competency of the evidence noted in the record, and subject to any and all additional objections which might be filed by counsel before the closing of the taking of evidence on the part of the defence—the intent being to avoid the retaking of the testimony. But it was provided that the foregoing stipulation should not apply to the testimony of Wescott, then deceased, whose testimony was included in that taken before Commissioner Shields. With reference to the Wescott testimony, it was admitted that he testified in the removal proceedings as set forth in the record thereof, but the defence reserved all objections to *the use* of the testimony, or to the admissibility or pertinency of the same, or any part thereof, in this cause, and the United States reserved the right to offer the said testimony of Wescott in evidence in this cause (Rec., p. 126).

It will thus be noted that, as to the Wescott testimony, it was stipulated only that it was truly transcribed. The testimony of Wescott was offered by the Government in this cause, over the objection of both Kellogg and Mrs. Leary; and the admission of this testimony was the basis of an assignment of error by each of the appellants in the Circuit Court of Appeals.

After the foregoing proceedings were had, Mary C. Leary, administratrix of James D. Leary, filed on April 18, 1908, a petition in the aforesaid cause praying leave to intervene, accompanied by the proposed petition or bill of intervention. (Rec., pp. 55 to 62.) The United States, Benjamin D. Greene, L. L. Kellogg, and the Norfolk & Western Railway Company were made parties to the intervention petition and served with notice thereof.

On May 30, 1908, the United States demurred to, and moved to strike, the said petition for leave to intervene.

On July 20, 1908, the Court entered an order overruling the petition and denying leave to intervene (Rec., pp. 63 to 67). *United States* v. *Greene*, 163 Fed. Rep., p. 442.

From this decree Mary C. Leary, administratix, appealed to the Circuit Court of Appeals for the Fourth Circuit, which affirmed the decree appealed from. *Leary* v. *United States*, 184 Fed. 433.

From the decision of that court Mrs. Leary appealed to this Court, which reversed the decrees of both courts below denying leave to intervene, and held that the intervention "bill, without amendment, showed a sufficient right to intervene" and that the intervenor "was dealt with too technically" by the courts below. *Leary* v. *United States*, 224 U. S. 567.

After the mandate of this Court went down Mary C. Leary, administratrix of James D. Leary, filed on May 20, 1913, in the District Court an amended bill of intervention. (Rec., p. 60, *et seq.*)

To the amended bill of intervention both the United States and the defendant Luther Laflin Kellog were made parties, and, as alternate relief, a personal decree against Kellogg was prayed.

On June 30, 1913, an order was entered on the motion of Kellogg striking from the said amended bill the prayer for relief against Kellogg. (Rec., p. 79.)

On June 9, 1913, the United States answered Mrs. Leary's bill of intervention (Rec., p. 79, *et seq.*).

On November 6, 1913, the Court entered an order whereby, among other things, Kellogg was allowed to file an amended answer, as of October 4, 1913, to the original bill "to be read only against the United States and not to be read against Mrs. Leary" (Rec., p. 101).

At the foot of Kellogg's answer the solicitor for the United States waived objection to the filing and allowance of the amended answer of Kellogg (Rec., p. 99).

In her bill of intervention Mrs. Leary set forth:

That in 1899, in the District Court of the United States in Georgia, a bill of indictment was found against Benjamin D. Greene and others charging them with conspiracy to defraud the United States; that in December, 1899, Greene was arrested in New York City upon a warrant issued by a United States Commissioner, based on the said indictment, and held to await a warrant of removal; that thereupon Greene personally, or through the mediation of Kellogg, his attorney, applied to James D. Leary to become the bail or bondsman of the said Greene in the sum of $25,000, and thus procure his discharge from the custody of the officers; that Leary consented to do so on condition that Greene would, simultaneously with the execution of the bond, deposit with Kellogg certain shares of Delaware & Lackawanna stock to be held by Kellogg in trust to indemnify and save Leary harmless against any loss which he might suffer by reason of becoming bondsman or surety of Greene; that with this understanding Leary signed and executed the required bond, Kellogg and Greene both then and there agreeing that the said stock, the property of Greene and then in the possession of Kellogg, should be held by the latter in trust for the indemnity of Leary; that afterwards the 400 shares of Norfolk & Western Railway stock, which the United States by the original bill was seeking to recover, were substituted for and in place of the Delaware & Lackawanna stock; that in May, 1901, a warrant for the removal of Greene to the State of Georgia for trial upon the indictment aforesaid was issued and he was taken in custody under the said warrant of

removal, but, subsequently, was again let to bail in the sum of $40,000 for his appearance in Georgia to answer the said indictment, Leary becoming surety in the last-mentioned bond on condition and with the understanding that the securities held as aforesaid by Kellogg should remain and continue in the hands of Kellogg as security and indemnity to Leary against any loss he might suffer or sustain by reason of his becoming bound in the said $40,000 bail bond.

The $40,000 bail bond was dated and executed on January 20, 1902, and a copy of it is set forth at large in the bill of intervention (Rec., p. 72). In this connection it is pointed out that in the answer of the United States to the bill of intervention it is submitted that the copy of the bail bond embodied in the bill of intervention is a true copy of the original executed on January 20, 1902, by Greene as principal and Leary as surety, "except that the original bail bond recites that the said Benjamin D. Greene presented his application for writ of habeas corpus on June 8, 1901, whereas the copy erroneously gives the date of said application as May 28, 1901" (Rec., p. 84).

The bill of intervention set forth the further facts that Greene having failed to appear in Georgia at the appointed time, the Court on the 7th day of March, 1902, made an order reciting Greene's default and forfeiting the bond, unless at the next term the obligors should show cause why such order should not be final; and that, no cause being shown, the Court on January 20, 1903, rendered final award of execution on the conditional judgment theretofore rendered; that meanwhile, on April 11, 1902, James D. Leary had died, and on April 21, 1902, Mary C. Leary was duly appointed administratrix; that on September 10, 1903, the United States brought suit against Mary C. Leary, as administratrix of James D. Leary, in the Circuit Court of the United States for the Southern District of New York, upon said $40,000 bond, and on the 6th of January, 1908, recovered judgment against her for the sum of $35,377.46, which said judgment, amounting with costs and inter-

est to $40,802, was paid by the said administratrix to the United States on or about December 31, 1910. (The payment of this sum is admitted in the answer of the United States—Rec., pp. 75 and 84.)

By reason of the premises, the intervenor charged that the defendant Kellogg held the Norfolk & Western stock, together with the dividends thereon, as trustee or depository for, and for the benefit and protection of, the intervenor, and that her claim upon and right to said securities were paramount to the claim asserted by the United States; and she prayed for a decree to the effect that the Norfolk & Western stock, together with so much of the accumulated dividends thereon as might be necessary to repay the said sum of $40,802, with interest from December 31, 1910, be transferred and turned over to her. She also prayed for general relief.

Kellogg having, as hereinbefore stated, succeeded in his motion to strike out the alternate prayer asking a decree against him personally, made no answer to the bill of intervention.

On December 13, 1913, the District Court entered a final decree whereby it was adjudged that the Norfolk & Western stock in controversy was the property of the United States free from the claims of all other parties, and directing the certificates of stock to be cancelled and new certificates issued therefor to and in the name of such persons, firm or corporation as the Attorney-General of the United States might designate to receive such certificates. And it was further decreed that the Norfolk & Western Railway Company should pay over to the United States the sum of $18,700, the accumulated dividends on the said stock (Rec., pp. 129-131).

The learned judge of the trial court filed no opinion setting forth his findings, either of law or of fact, constituting the grounds for the conclusions reached. (Rec., pp. 129 to 131.)

Mrs. Leary, as administratrix, thereupon prosecuted an appeal to the Circuit Court of Appeals for the Fourth Circuit. Pending this appeal, Mrs. Leary died, and the said Daniel J.

and George Leary qualified in her stead as administrators of James D. Leary, deceased, and were admitted as parties to the said appeal.

Kellogg also appealed.

FINDINGS OF THE CIRCUIT COURT OF APPEALS

On the 12th day of November, 1915, the said Circuit Court of Appeals reversed the decree of the District Court, and filed an opinion, which is in the record at pages 143 to 151. *Leary v. United States*, 229 Fed. Rep. 660.

From this it appears that the said Circuit Court of Appeals passed upon the facts as follows:

First, it assumed, for the purposes of the appeal without discussing the evidence, that the Norfolk & Western shares, or securities for which they were substituted, were purchased by Greene with funds of which he had defrauded the Government.

Second, the Court found that at the time the original indemnity agreement was made neither Leary nor Kellogg knew or had reason to believe that the securities which Greene placed in Kellogg's hands about that time were not honestly acquired.

Third, the Court found that the bond of January 20, 1902, which Greene forfeited by failure to appear, and which Leary's estate afterwards had to pay, was signed by Leary "upon the condition and understanding, as alleged in the intervention bill, that the securities held by Kellogg should remain and continue in his hands as indemnity to Leary for signing the last-mentioned bond."

Fourth, the Court found as a fact that the Norfolk & Western stock involved, which stands in the name of Kellogg, the ownership of which is the subject of controversy in this suit, constitutes the trust fund from which Leary's estate may claim reimbursement.

Respecting the objection that Greene was not made a party to the intervention it was held that he was not a necessary party because (a) "The record shows Greene had actual notice of the proceedings by the personal service upon him of a copy of the petition and proposed bill of intervention with a copy of the order of the Court citing him to show cause" against the filing of the petition and the granting of the prayers therein, which order stated that "such service of copies shall be sufficient service to entitle the Court to proceed herein and to adjudicate upon the filing of said petition and the prayers thereof." (b) The amended petition differs from the original in no material respect so far as Greene is concerned. (c) The decree *pro confesso* against Greene divested him of every interest in the stock. (d) This objection was not made on the former appeal either in the Circuit Court of Appeals or the Supreme Court and is "in no aspect of the case of any practical importance." (Rec., p. 150.)

Upon the whole case the Court concluded that the Leary estate had established a claim to the stock in question superior to the claim of the United States.

ERRORS ASSIGNED

In form the United States has prosecuted to this Court three appeals from the decree and findings of the Circuit Court of Appeals, assigning twenty-five errors, all based upon the same record. (Rec., pp. 153, 162, and 170.) These appeals are taken against the Leary estate, against Luther Laflin Kellogg, and against the Leary estate and the said Kellogg.

So far as the errors assigned may affect the Leary estate with which this brief is concerned, they may be summed up as follows:

The United States complains because it says the Circuit Court of Appeals held:

1. That the Leary estate has established a claim to the Norfolk & Western Railway Company stock in controversy which is superior to the claim of the United States.

2. That James D. Leary was not shown by the evidence to be on full constructive notice at and before the execution of the bond of January 20, 1902, that the securities then held by Benjamin D. Greene or by said Luther Laflin Kellogg for said Greene, were purchased with proceeds of funds of the United States fraudently diverted to his own use by said Greene.

3. That the question of notice to the said Kellogg and to the said Leary of the alleged rights of the United States in and to the said securities should be determined by the situation when the first bond was given on December 14, 1899, and not by the situation when the defaulted bond of January 20, 1902, was given, in which bond the United States alleges in its assignment of errors but not in its answer, there were references sufficient to put Leary upon notice that Greene was guilty of having fraudulently acquired $722,528.03 of Government funds.

4. That the said Benjamin D. Greene was not a necessary party defendant to the intervention bill filed by the Leary estate and to the first appeal to the Circuit Court of Appeals for the Fourth Circuit, taken from the order of the District Court of July 20, 1908, which first denied leave to file said intervention.

5. That notwithstanding the intervening Leary estate did not take a decree *pro confesso* against Greene and against Kellogg, it could enforce its equitable contract rights to the property in question.

6. That there was a sufficient description and designation of the particular securities to be held by Kellogg for Leary's indemnity.

7. That the indemnity agreement was not confined to the first bond given on December 14, 1899.

8. That the Leary estate did not have the burden of proving that said Leary, when the final bond of January 20, 1902, was executed, was a *bona-fide* purchaser for value without notice of Greene's fraud and of the taint on Greene's and Kellogg's title to the securities in question.

9. That the United States did not have the better equity in the said securities notwithstanding the United States is the diligent suitor and holds the oldest equity.

10. That the original answer of Kellogg, verified March 1, 1904, should be treated on the final hearing on the merits as an affidavit and evidence against the United States.

The questions raised may be here conveniently discussed by considering the indemnity agreement, the pledged fund, the equity therein of the Leary estate, the decrees *pro confesso* taken or omitted, the parties impleaded, and the evidence offered.

ARGUMENT

I

A Valid Contract of Indemnity and Pledge of Security was Made to James D. Leary Covering the Forfeited Bond.

THE LETTERS

Evidence of the indemnity agreement consists in part of the following four letters (Rec., pp. 113, 114, and 115), one of which, that of December 14, 1899, was introduced by Kellogg under a stipulation with the United States, and the others were introduced by the Leary estate:

(Law Office of Kellogg, Rose & Smith, Equitable Building, 120 Broadway. L. Laflin Kellogg, Abram J. Rose, Arthur H. Smith, Alfred C. Pette, Philip M. Brett.)

New York, Jan. 19, 1900.

Jas. D. Leary, Esq.,
Hoffman House, New York City.

My dear Mr. Leary: I herewith send you the letter which you were entitled to have in regard to your qualification as bondsman for Captain Greene. I was waiting for you to call for it.

As you see, I wrote the letter the very day that I received the stock.

Yours very truly,

Encl. L. LAFLIN KELLOGG.

(Law office of Kellogg, Rose & Smith, Equitable Building, 120 Broadway.)

New York City, Dec. 14, 1899.

James D. Leary, Esq.

My dear Sir: Captain Benjamin D. Greene has placed in my hands, as indemnity to you for becoming his bondsman in the matter of the United States against Greene, Gaynor and others now pending in the District Court, three hundred shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company.

It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligation. I am,

Yours truly,

L. LAFLIN KELLOGG.

(Kellogg & Rose, attorneys and counselors at law, Equitable Building, 120 Broadway, New York.)

New York, May 21, 1901.

James D. Leary, Esq.,
17 State St., New York City.

My dear Mr. Leary: It will be necessary to renew the bail given by you for Captain Greene, and for which I hold the security for your protection, on Thursday morning next at 10:30.

Will you kindly come to the office for that purpose about 10:15. I am very sorry to trouble you, but it can not be helped. This new bond is to take the place of the old one without additional liability.

Yours truly,

L. LAFLIN KELLOGG.

Call up Mr. Kellogg.

(Kellogg & Rose, attorneys and counselors at law, Equitable Building, 120 Broadway, New York.)

New York, June 6, 1901.

James D. Leary, Esq.,
17 State St., New York City.

My dear Mr. Leary: I am obliged to trouble you again to renew the bond in the Greene and Gaynor matter. I will have to trouble you to be in court between ten and half past ten Saturday morning.

The reason for the matter is not that you have to incur any additional liability, but simply to enable them to carry their case to the United States Supreme Court.

All the parties and all the other bondsmen will be on hand before Judge Lacombe by a special arrangement (as the judge is going away) on Saturday morning at half past ten.

Please let me hear from you to-day as the matter is most important.

With kindest regards, and hoping that you did not suffer from your misstep in the office, I am,

Yours very truly,

L. LAFLIN KELLOGG.

Says the opinion of the Circuit Court of Appeals (Rec., p. 148):

"That some contract was made for the protection of Leary can hardly be denied. The Kellogg letter of December 14, 1899, admits of no other explanation. It shows that a specified security was placed by Greene in the hands of Kellogg for the express purpose of indemnifying Leary against liability as Greene's bondsman in the matter therein mentioned, namely, 'the matter of the *United States*

> v. *Greene*.' True, it says that the stock described is to be held 'until you are released from the said bond,' which was the bond that day executed; but in view of what followed, is it not quite unreasonable to suppose that these words expressed the full intent and purpose for which the stock was placed in Kellogg's hands? Plainly, the 'matter' referred to was the removal of Greene from New York, where he was arrested, to the Southern District of Georgia, to answer an indictment there found against him; and it is undeniable that all the bonds signed by Leary, including the one forfeited, were given at various stages of the removal proceedings, and that all of them had reference to his appearance for trial in the district where he was indicted. They were different parts, so to speak, of a single transaction."

It is submitted with unfeigned confidence that any one reading the letters "as he would read an untechnical document" can have no doubt that the stocks were meant and intended to stand as indemnity to Leary for becoming Greene's bondsman in the matter of the United States against Greene.

In the letter of December 14, 1899, Kellogg tells Leary that Greene has placed in his hands "as indemnity to you for becoming his bondsman in the matter of the United States against Greene, Gaynor and others, now pending in the District Court, three hundred shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company." It is true that in the succeeding paragraph of the letter Kellogg states that he is to hold the stocks until Leary is released "from the said bond," but he adds that in case Leary's liability—as Greene's bail "in the matter of the United States against Greene," of course—shall be established, the securities are to be applied in payment of Leary's obligation.

Even if that letter, standing alone, could be distorted into a pledge of the stocks as indemnity to Greene against only the first bond executed by him as bail for Greene, the letter of May 21, 1901, dispels the illusion. In this letter Kellogg tells Leary that it will be necessary *to renew* the bail given by Leary for Greene, "for which I [Kellogg] hold the security for your protection."

On June 6, 1901, Kellogg again addressed Leary, saying to him that he is obliged to trouble him "*again to renew the bond* in the Greene and Gaynor matter."

It will be observed that the "matter of the *United States* v. *Greene*" referred to in the letter of December 14, 1899, was that Greene should appear to answer in the District Court of the Southern District of Georgia the indictment found against him in that court; and it should be here remarked again that the various bonds upon which Leary became security, as shown by the record, were each and every one taken at one stage or another of the proceedings to have Greene answer the said indictment in the matter of the United States against Greene. That this arrangment thus made between Greene, Kellogg, and Leary was intended by them to extend throughout the proceedings taken to have Greene answer the said indictment in the matter of the United States against Greene, is made entirely clear by the letter of May 21, 1901 (Rec., p. 114), in which Kellogg writes Leary: "It will be necessary to renew the bail given by you for Capt. Greene, and for which I hold the security for your protection. . . . This new bond is to take the place of the old one without additional liability."

Acting upon this construction put upon the indemnity agreement by Greene, through his counsel Kellogg, Leary "renewed the bail" and went upon the "new bond."

Again, on June 6, 1901 (Rec., p. 114), we find Kellogg writing to Leary: "I am obliged to trouble you again to renew the bond in the Greene and Gaynor matter. . . . The reason for the matter is not that you have to incur any additional liability."

Upon this second reiteration of the continuing nature of the indemnity agreement of December 14, 1899, Leary again renewed the bond. While it is true that the bonds given up to and including the bond of June, 1901, were exonerated, and while it is also true that no further letter appears in the record referring specifically to the bond for $40,000 of January 20, 1902, which, after Greene's default, Leary's estate was com-

pelled to satisfy, Greene would not be heard to say, after having twice expressly recognized the continuing force of the agreement to indemnify Leary in the matter of the United States against Greene, that because, forsooth, Leary went upon the last bond given in the same matter—which in the same sense used in the letters was but a renewal of the previous bond—without requiring a third written reiteration in writing from Greene of the continuing force of the indemnity agreement of December 14, 1899, that the agreement was not intended to cover this particular one of the several bonds given by Leary for Greene in the same matter of the *United States* v. *Greene*. The United States stands upon no better grounds to deny the continuing force of the agreement to which it was not a party and as to which at the time it was made Leary had no reason to suspect the United States had any interest.

At the time the letter of May 21, 1901, was written the first bond was defunct; yet in this letter there is the express admission by Kellogg that he is holding a "security" for Leary's "protection" as bail for Greene, a clear recognition that the indemnity agreement was not limited to the first bond given, and that the course of dealing between the parties established the right of Leary to maintain that this indemnity agreement was intended to and did apply to every bail bond that Leary might give in this matter of the United States against Greene.

The Attitude and Actions of the Trustee

In the original answer of Kellogg, verified March 1, 1904, which was also to be treated as an affidavit, the following allegations appear (Rec., p. 52):

> "XXVI. This defendant further says with reference to the said 400 shares of the Norfolk & Western stock mentioned in said bill:
>
> "That at the time of the arrest of said Benjamin D. Greene in December, 1899, he was held to bail in the sum of $25,000. That a friend and client of defendant, one Leary, became surety on the bond for his appearance

before the commissioner in the sum of $25,000, on defendant's giving to said Leary a written guarantee to hold him, Leary, harmless from loss or damage by reason of his becoming surety for said Greene.

"That at about that time said Greene deposited with defendant some securities for the purpose of indemnifying defendant against loss by reason of his having indemnified said Leary, with the understanding that at any time he desired he might withdraw the securities so deposited and dispose of them, substituting others in their place. That the securities so deposited were also to be held by the respondent to secure him for the fees and disbursements that might be incurred by him or his firm in defending said Greene, or in caring for his interests in any proceedings brought by the United States against him, or in any other matters, there being several matters of litigation, in which said Greene was interested, pending in the respondent's office.

"That from time to time the securities so deposited were withdrawn by Greene and others substituted in their place, and that the Norfolk & Western stock, now in defendant's hands, are securities that the defendant deposited or substituted in place of those originally deposited, and that the respondent now avers that he holds said Norfolk & Western stock as a *bona-fide* holder, as security for the obligation that he is under to the said Leary by reason of his having become surety on said bond, or by reason of the said Leary having gone upon another bond for the sum of $40,000 for Greene's appearance in the State of Georgia after the conclusion of the said removal proceedings, the agreement to indemnify Leary having been extended to cover said last-mentioned bonds, and also to secure the payment to the respondent, and to his firm of the various sums of money that he has advanced and for services rendered for said Greene in various matters since that time.

"The respondent further says that he is informed and believes and charges the truth to be that the said Greene is amply responsible financially to meet and to pay any judgment that may be obtained against him by the United States in a suit brought to recover moneys wrongfully or fraudulently obtained by him.

> "He further says that he personally is amply responsible financially to meet and pay any judgment that may be recovered by the United States against him for the value of the said 400 shares of Norfolk & Western stock, if the Government should sue him, and recover such value in an action at law."

After the Leary estate in filing the amended intervention had asked in the alternative for a personal decree against Kellogg, based upon his assertion in the aforesaid answer that he (Kellogg) had given Leary a guarantee to hold him harmless and that the agreement had been extended to the forfeited $40,000 bond, Kellogg filed an amended answer (Rec., pp. 86 to 99), verified October 3, 1913, omitting any reference to his guarantee to Leary and to the indemnity agreement having been intended to cover the forfeited bond, but not deny such was the intention of the parties. This amended answer was allowed to be filed only against the United States, and was not to be read against the Leary estate (Rec., p. 101).

Kellogg, in his appeal to the Circuit Court of Appeals, assigned error in the decision of the trial court awarding the stock to the United States, "because the said securities had been deposited under an agreement that they should be held by the defendant Kellogg, as indemnity for loss by reason of James D. Leary becoming bail for said Benjamin D. Greene, and thereby an equitable lien was created thereon in favor of the defendant Kellogg as trustee for the benefit of the Leary estate." (Rec., p. 149.)

The Situation of the Parties

The record does not show that there was ever any transactions or association of any kind between Greene and Leary except as to Leary's suretyship upon the bail bond referred to and no testimony appears as to why Leary should be willing without motive or prospect of gain and without indemnity to execute a $40,000 bond when he had exacted security when executing a bond for but about half that amount.

It was contended in the court below, and no doubt will be here, that the evidence is insufficient to show the alleged agreement with reference to indemnifying Leary; but the agreement abundantly appears. It is sufficiently shown by the letters which passed between Leary and Kellogg (Rec., pp. 113, 114, and 115).

When the cause came on to be heard on the merits on October 29, 1913, Kellogg offered in evidence "Stipulation X," whereby it was agreed between the United States and Kellogg that on the trial of this cause a copy of the *first* of these letters, dated December 14, 1899, and embodied in the said stipulation, might be offered in evidence by Kellogg "with the same force and effect as if the original of the said letter had been produced and offered in evidence, the United States waiving the production of the original and admitting that such original was written to said Leary on December 14, 1899, and delivered to said Leary by said Kellogg on or about January 19, 1900." But when Mrs. Leary offered in evidence, in addition to the letter dated December 14, 1899, two other letters, dated, respectively, May 21, 1901, and June 6, 1901, from Kellogg to Leary, her effort was met by the determined opposition of the United States (Rec., p. 56). But the Court most properly and justly admitted the letters in evidence.

Kellogg having filed no answer to Mrs. Leary's bill of intervention, the same stands for confessed as against him.

There is no explanation of Kellogg's continued possession of the stocks except that they were pledged to indemnify Leary against liability or loss on the $40,000 bond. If the parties had understood that they were pledged for Leary's indemnity on the $25,000 bond only, the stocks would have been surrendered and given up when the bond was renewed.

Indeed, while two or more bonds were executed by Leary, they in fact constituted parts of but a single transaction. Greene was in the clutches of the law and it was necessary for him to find bail or be taken in custody. He applied to Leary to bail him and put these securities up to indemnify him. The

bailing of Greene by Leary, while it involved the execution of two or more bonds, *was*, nevertheless, *one single and connected transaction or matter*. That matter was going security for Greene's appearance, he having been indicted in the United States Court in Georgia.

This suit is an equity suit. *Courts of equity regard the substance and disregard the mere form of things.* The *substance* of the matter was the bailing of Greene by Leary in consideration of Greene's putting up the securities for Leary's protection. That the accomplishment of this single purpose of protecting Greene from being taken to jail took the *form* of two or more bonds—the tenor of the first being that he should await the warrant of removal, and the tenor of the others being that he should appear in court to answer the indictment—does not affect the *substance* of the transaction; and it would be sacrificing substance to the merest form to say that the circumstance that Leary's undertaking was expressed in two papers affects the rights of his representative in the premises.

It is not to be supposed that Leary, who was careful to require indemnity before going security on the $25,000 bond, should be willing, or be presumed to have agreed, to incur liability on the $40,000 bond without indemnity. The reasonable presumption is just the reverse. Even if this were not so, very slight evidence should suffice to show that the *intention of the parties* was that the pledge of the stocks should cover Leary's entire liability in the premises.

But we have conclusive evidence—the uncontroverted and indisputable fact that the stocks were expressly pledged for Leary's indemnity the four letters which passed between Leary and Kellogg, and the deliberate confession of Kellogg, the holder of the legal title to the stocks, that they were pledgd for Leary's indemnity on the last bond.

Certainly Greene himself could not, as he does not, controvert Mrs. Leary's claim. Kellogg, the holder of the legal title to the securities, solemnly concedes the trust, and the United States, which was not a party to the agreement, having

failed to affect Leary with the alleged taint upon the title to the securities, will not be heard to deny them to his estate.

II

The Norfolk & Western Stock Impounded in the Suit is the Security Pledged to Leary's Indemnity.

Says the Circuit Court of Appeals, "if the stock first placed in Kellogg's hands was impressed with a trust in favor of Leary, the stock that replaced it became impressed with the same trust when the substitution took place, because it was then set apart and pledged for the protection of Leary." (Rec., p. 149.)

The letter of December 14, 1899, shows that 300 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company was the original trust fund pledged to the indemnity of Leary. Kellogg says in his answer and affidavit that Greene reserved the right to exchange the securities transferred, and that the Norfolk & Western stock was in fact substituted for the Delaware, Lackawanna & Western stock originally deposited.

That the Norfolk & Western stock was substituted for the Delaware, Lackawanna & Western stock as the indemnity fund is shown in two ways, either of which is sufficient to sustain the claim of the Leary estate thereto: (1) The proceeds of the sale of Delaware, Lackawanna & Western stock has been traced into the purchase of the Norfolk & Western stock, and (2) The Norfolk & Western stock ever since its purchase has been held and treated as the indemnity fund by the parties to the indemnity agreement.

It appears from a stipulation between the United States and Kellogg, entered into before the Leary intervention was filed, that the proceeds of the sale of the Delaware, Lackawanna & Western stock found its way into the Norfolk & Western stock, that stipulation appearing on page 122 of the record, as follows:

"Third. Item March 23, 1900. Sale by A. W. Kilbourne & Company, in account kept in the name of L. L. Kellogg, of 400 shares of Delaware, Lackawanna & Western Railroad Company stock, $35,791.50.

"Item March 23, 1900. Sale of A. W. Kilbourne & Co., in account kept in the name of L. L. Kellogg, of 600 shares of the Canada Southern Railway Company stock, $29,724.50.

"Item March 26, 1900. Sale by A. W. Kilbourne & Co., in account kept in the name of L. L. Kellogg, of 100 shares Canada Southern Railway Company stock, $4,958.25.

"These three items aggregate $70,474.25.

"Stipulation: That the proceeds of said securities so sold were used by A. W. Kilbourne & Co., as far as said proceeds went, in the purchase, in account kept in the name of L. L. Kellogg, of the following securities shown in Exhibit 'F': March 23, 1900, purchases by A. W. Kilbourne & Co. 1,000 shares of Canada Southern Railway Company stock, $51,775; March 26, 1900, purchases by A. W. Kilbourne & Co., in account kept in the name of L. L. Kellogg, 500 shares of Norfolk & Western Railway Company stock, $18,812.50. That the said purchases and sales were conducted in the name of L. L. Kellogg for B. D. Greene and at the instance and request of B. D. Greene, the two items of purchases above referred to amounting to $70,587.50."

The sale of the D. L. & W. stock was thus made on March 23, 1900, and the purchase of the N. & W. stock was made on March 26, 1900, and, therefore, when Kellogg wrote the letters of May 21, 1901, and June 6, 1901, asking Leary to renew the bail, "for which I hold the security for your protection," and saying that the renewals were "without additional liability" and "not that you have to incur any additional liability," since Kellogg did not then have the D. L. & W. stock which had been sold, but did have the N. & W. stock purchased with the proceeds of such sale, of necessity the references in these letters to "the security held" was both an assurance to Leary and an

admission by Kellogg that he held the N. & W. stock impressed with the same trust for Leary, and that the indemnity agreement was to be understood as a continuing agreement covering the bonds made or renewed by Leary for Greene in the removal proceedings.

At that time the bond of February 20, 1900, for $25,000 on which Leary was surety for the appearance of Greene on application for removal warrant before Judge Addison Brown was in force (Rec., p. 80), as to which bond Kellogg wrote Leary in the letter of May 21, 1901, "for which I hold the security for your protection," and it would indeed have been a fraud upon Leary's rights if Kellogg had not held impressed with the trust the proceeds of the D. L. & W. stock then reinvested in the N. & W. stock.

Again, it appears that when the United States filed its original bill in this cause in 1903, while at that time the obligation of Leary upon the forfeited recognizance had not been reduced to judgment against his estate, and thus its "liability" had not as yet been "established," though the estate was being sued therefor, the only stock of Greene's which remained in Kellogg's hands was this same N. & W. stock thus held by Kellogg for Leary's protection, awaiting the outcome of the suit by the United States upon the forfeited recognizance against the Leary estate; and as pointed out above, Kellogg, the trustee, promptly so asserted in his answer under oath to the original bill, and reiterated that position in his assignments of error upon the appeal below.

It having been established, as pointed out above, that a continuing contract of indemnity was made between the parties by which the D. L. & W. stock was impressed with a trust in favor of Leary, that trust will be impressed upon any successive reinvestment of the proceeds of the D. L. & W. stock until the trust shall have been discharged, unless a contrary intention concurred in by all the parties affected is established.

That the N. & W. stock was intended to be substituted for the D. L. & W. stock and to be subject in the same way to the

trust in favor of Leary, is established in at least the following several ways:

FIRST. It appears from Exhibit F that at least some $18,000 derived from the sale of the D. L. & W. stock went into the purchase of the N. & W. stock (Rec., p. 37). Indeed the stipulation between the parties to the original bill is to the effect that out of the proceeds of the sale of certain securities, including the D. L. & W. stock, which proceeds aggregated $70,474.25, there was purchased among other securities the N. & W. stock in question. (Rec., p. 122.)

SECOND. It further appears that at the time the letters of Kellogg to Leary of May and June, 1901, were written, in which there is a distinct reference to the indemnity agreement for "security" held by Kellogg, the change of investment from D. L. & W. stock into N. & W. stock had already been made so that there was here a recognition by Kellogg, the trustee for Leary and also the attorney for Greene, that this N. & W. stock thus held by him as security for Leary was impressed with the trust of the indemnity agreement.

THIRD. Though it appears from the record that various other securities of Greene were held at different times by Kellogg, the N. & W. stock alone among these securities remained in Kellogg's hands at the time of the bringing of this suit by the Government. This retention of this particular stock by Kellogg is a pregnant circumstance tending to show that this stock was held apart for some purpose different from the purposes for which the other stocks bought with Greene's monies were held by Kellogg.

FOURTH. Upon the bringing of the original suit, which was filed December 19, 1903, the defendant, trustee, and attorney Kellogg, by his sworn answer filed at the March Rules, 1904, scarcely more than two years after the execution of the bond on which the liability of Leary accrued, sets out explicitly, under oath, in paragraph 26 of his original answer,

that this N. & W. stock had been placed in his hands by Greene in some substitution for some securities that Greene in December, 1899, had placed in his hands as indemnity because of an agreement with one Leary, who had gone on Greene's bail bond; and in this connection Kellogg expressly avers that "the agreement to indemnify Leary having been extended to cover said last-mentioned bond," which was the bond for $40,000 in question. (Rec., p. 52.)

As potent as are these several grounds for the position taken when considered separately, when considered together and along with the other indications to the same effect appearing in the record and in the conduct of the parties thereto, the conclusion is irresistible, that it was intended by all of the parties to the agreement and before the Government undertook to assert any claim to the stock, that this Norfolk & Western stock should be considered to be and was pledged to the indemnification of Leary.

It is submitted that the finding of the Circuit Court of Appeals to this effect is plainly right, whether the conclusion be rested upon the evidence that the proceeds of the sale of the D. L. & W. stock went into the purchase of the N. & W. stock or upon the fact that the parties to the indemnity agreement treated the N. & W. stock as substituted for the D. L. & W. stock, or upon both of these findings.

III

The Equity of the Leary Estate in the Pledged Norfolk & Western Stock is Superior to that of the United States.

The decree *pro confesso* taken by the United States against Greene upon the original bill, could not affect the claim of the Leary estate, which was not at that time a party to the suit.

Though Greene may not have cared to contest the claim of the United States that the impounded stock was purchased

with diverted funds, or with the proceeds of reinvestments thereof, the Leary estate, if it is to be affectd by that claim, has the right either itself or through the trustee Kellogg to contest the claim, because the equity which the Government asserts must rest upon its successful establishment of its claim against both Kellogg and the Leary estate as well as against Greene.

Unquestionably it devolved upon the United States:

1. To establish that Greene embezzled monies belonging to the United States;

2. To trace the monies so embezzled into the Norfolk & Western stock, which is the subject-matter of the litigation;

3. To establish that Kellogg, in whose name the stock stands, had notice or knowledge when he took the stock that the money with which it was purchased had been stolen by Greene from the United States;

4. To establish that James D. Leary had notice or knowledge, when he agreed to become Greene's bail or bondsman, that the money with which the stock was purchased had been stolen by Greene.

If either Kellogg or Leary knew that the stock in question was purchased with monies of which the United States were defrauded, he was not merely *particeps fraudis*, but *particeps criminis;* and inasmuch as fraud and crime are never presumed, but must be distinctly alleged and clearly proved, the burden plainly rested upon the United States to establish such notice or knowledge *beyond a reasonable doubt*.

That Greene did defraud the United States of $722,500 (in round numbers) counsel for the Leary estate, from sheer necessity—in order to avoid the enormous cost of printing all the evidence offered by the Goevrnment on that score—concedes; but she denies that the Norfolk & Weste[illegible] stock in controversy was purcha[illegible]d with any of the funds of which Greene defrauded the United States, or that such monies were

invested in whole or in part, directly or indirectly, in the said stock.

Has the United States Succeeded in Tracing the Stolen Money Into the Stock?

The evidence relied upon by the United States on this point is *wholly circumstantial.*

The rule applicable in such cases is that when mere circumstances are relied upon to establish a fraud or crime, the evidence so relied upon must be so strong as to exclude every other reasonable hypothesis. The result of the circumstantial evidence relied on by the Government with reference to the shares of stock in controversy is tabulated in "Exhibit F," which constitutes page 37 of the record, and is as follows:

> (*a*) That on March 23, 1900, Kellogg sold through Kilbourne & Co. 400 shares of Delaware, Lackawanna & Western Railway stock for $35,791.50; 600 shares Canada Southern for $29,924.50;
>
> (*b*) That on the same day he bought through Kilbourne & Co. 1,000 shares of Canada Southern for $51,775;
>
> (*c*) That on March 26, 1900, he sold through Kilbourne & Co. 100 shares of Canada Southern for $4,958.25;
>
> (*d*) And on the last-mentioned day he bought through Kilbourne & Co. 500 shares of Norfolk & Western stock for $18,812.50.

Afterwards, on, to-wit, July 17, 1901, and November 5, 1901, the shares of Norfolk & Western stock so bought by Kellogg were transferred to him on the books of the Company; and 400 of these shares were represented by certificates numbered 5896, 5897, 11077, and 74200, and are the shares involved in this suit.

The transactions of March 23, 1900, were the sale of stocks the price of which aggregated $35,791.50 plus $29,724.50,

making $65,515.00, and the purchase of stocks the price of which aggregated $51,775.00.

The transactions of March 26, 1900, were the sale of stocks the price of which amounted to $4,958.25, and the purchase of stocks the price of which amounted to $18,812.50.

In respect to these transactions it is stipulated (Rec., p. 122) that the proceeds of the securities sold were used by Kilbourne & Co., as far as the said proceeds went, in the purchase of the 1,000 shares of Canada Southern, purchased March 23, 1900, and the 500 shares of Norfolk & Western purchased March 26, 1900. The stocks *sold* on March 23d and March 26th aggregated $70,474.25. The stocks *purchased* on these two dates aggregated $70,587.50. (Rec., p. 122.)

In an effort to show that the stocks which were sold were purchased with monies belonging to the United States, the latter introduced "Exhibit No. 701," purporting to be an account from the books of Lee, Livingston & Co., showing their transactions with Greene from May 1, 1892, to February 1, 1900, from which it appears, *as to Delaware & Lackawanna* stock:

(*a*) That 600 shares were bought on October 11, 1893, and delivered on the following day to the American Exchange National Bank for Greene;

(*b*) That on September 29, 1897, Greene delivered to Lee, Livingston & Co. 400 shares of Delaware & Lackawanna, evidenced by four certificates not bearing the same numbers as those delivered by the brokers to him on October 11, 1893;

(*c*) That on October 4, 1899, Lee, Livingston & Co. delivered to Greene 400 shares of Delaware & Lackawanna, evidenced by certificates bearing different numbers, but stated to be in lieu of the ones delivered to them by him on October 4, 1899.

As to the *Canada Southern* stock, it appears from "Exhibit 701":

(*a*) That 500 shares were brought on September 24, 1897;

(*b*) That 200 shares were bought on November 3, 1897;

(*c*) That 700 shares were delivered by the brokers to Greene on October 4, 1899, evidenced by certificates bearing different numbers from those purchased except in two instances.

The foregoing, in substance, is the evidence upon which the United States bases the claim that the stock in controversy here was purchased with money of which the United States were defrauded by Greene. It is confidently submitted that the evidence is wholly insufficient.

It is not shown that monies received by Greene from the Government were the only monies Greene had. On the contrary, it appears in various ways that *Greene had other sources of income.*

Thus the uncontroverted testimony of Kellogg is that Greene had been a man of affairs engaged in the performance of large contracts either as principal or as financial backer, and that he knew him as a man of wealth at the time he first became acquainted with him in the year 1892.

By reference to "Exhibit E" with the bill (Rec., p. 36) it will be seen that the *first* money alleged to have been received by Greene from the fraudulent transactions with which he is charged was received on January 3, 1893, and that *the last money received by him was July 6, 1897.*

By reference to "Exhibit 701," it appears that the account with Lee, Livingston & Co. was opened March 22, 1893, by the receipt by Greene of $5,000 of Tennessee Coal & Iron Firsts which were sold for $4,468.75, and other securities bought with the proceeds; and that on October 24, 1893, Greene turned over to his brokers $10,000 Missouri, Kansas & Texas Firsts (of which bonds $6,500 were owned by him on *July 8, 1892*, prior to the time, January 3, 1893, when the first alleged fraudulent payment was made to him, and had

been deposited by him with the American Exchange National Bank, on July 8, 1892, as collateral (see Exhibit 701); and that *on the same day* Greene delivered to the brokers $5,000 Missouri, Kansas & Texas Seconds (see Exhibit 701). These also were owned by him on *July 8, 1892*, and were part of the securities deposited with the American Exchange National Bank as collateral (see Exhibit 700).

It further appears from the last-mentioned Exhibit (700) that Greene, on May 7, 1892, and on July 8, 1892, borrowed from the American Exchange National Bank $31,000 and deposited as collateral security:

$5,000 bonds Richmond & West Point Terminal,
5,000 bonds Tennessee Coal & Iron,
6,500 bonds Missouri, Kansas & Texas Firsts,
5,500 bonds Missouri, Kansas & Texas Seconds,
25 shares Missouri, Kansas & Texas Preferred Stock,
200 shares Long Island,
100 shares Delaware & Hudson,
25 shares Chicago & Northwestern,
40 shares American Telegraph & Cable Company.

That on February 1, 1893, *with the same collateral*, he borrowed $10,000 more, and on March 7th, *with the same collateral*, he borrowed $4,000 more. As already pointed out, he opened the account with Lee, Livingston & Co. on March 22, 1893.

Thus it abundantly appears that in the speculative account conducted by Lee, Livingston & Co. for Greene numerous securities owned by him prior to January 3, 1893—the date of the first alleged fraudulent receipt of monies of the United States to him—figured, and thus conclusively that the alleged fraudulent receipts by him were not the only source from which the securities represented by that account were purchased.

Moreover, it conclusively appears by Exhibit 705 that during the years 1894, 1895, 1896, and 1897, loans were made to Greene by the American Exchange National Bank aggregating

$119,000. That these loans entered into the Lee, Livingston & Co. account, is clearly shown by the fact, as shown by Exhibit 701, that securities from time to time were delivered by the brokers to the American Exchange National Bank, to be used no doubt as collateral for loans made by that bank to Greene. Furthermore, the account itself shows that from time to time as securities were sold by the brokers the proceeds were used in the purchase of other securities by them for Greene.

Thus the first transaction shown by the account is the sale of $5,000 Tennessee Coal & Iron Firsts for $4,468.75, and the purchase on the same day of 3,000 Missouri, Kansas & Texas Firsts, 75 shares of Northwestern, and 500 shares of Missouri, Kansas & Texas. For the difference in amount received for Tennessee Coal & Iron Firsts and the amount paid for the securities bought on the same day a check was given by Greene for $6,756.16 (see Exhibit 701).

On May 21, 1897, securities were sold for $80,850. Of this amount there was turned over by check to the American Exchange National Bank $64,000, and there was paid to Greene to balance the account $9,314.24. On this single transaction Greene realized in cash $73,314.24 (see Exhibit 701).

Exhibit 701 shows that on September 29, 1897, Greene delivered to the brokers 400 shares of Delaware & Lackawanna stock, evidenced by certificates numbered 117174, 117175, 117840, and 117844. On October 4, 1899, the brokers delivered to Greene 400 shares of Delaware & Lackawanna, evidenced by certificates numbered 119966, 119967, 119928, 119929. Thus the 400 shares delivered on October 4, 1899, were *not the shares* which Greene, on September 29, 1897, turned over to the brokers, but were other shares which, theretofore, belonged to Lee, Livingston & Co., or were purchased by them with their own funds.

Thus it plainly appears from the Government's own evidence that the 400 shares of Delaware & Lackawanna stock, which were subsequently replaced or substituted by the Norfolk & Western stock involved in this controversy, was stock which

prior to October 4, 1899, was never owned by Greene, but which on that date, or theretofore, were purchased by Lee, Livingston & Co. with their own funds and turned over by them to Greene.

The 700 shares of Canada Southern stock delivered on October 4, 1899, were not the same, but different stock from that purchased on September 24th and November 3, 1897. This is shown by the fact that the certificates bear different numbers.

The account (Exhibit 701) shows on its face that it was a speculative or "margin" account, and that the monies paid by Greene to the brokers were not for the purchase of stocks, but in discharge of his indebtedness to the brokers for advances made by them to him on account of purchases of stock. It is matter of common knowledge that where stocks are bought and sold on "margin" the customer never puts up the actual purchase price of the stock, but only a sufficient "margin" to cover fluctuations in the prices. The monies with which the securities are bought are advanced by the broker for the purchaser and the broker retains the securities purchased as collateral for the loan. The purchaser is only required to pay the broker a sufficient sum of money to protect the broker. In other words, the customer is only required to maintain a "margin." When securities are sold the customer is credited with the proceeds, and if they *exceed* the amount paid for the securities a check for the difference is given to the customer as his profit. On the other hand, if the price at which the securities are sold is *less* than the purchase price thereof, the *difference* is deducted from the margin deposit; and any indebtedness from the customer to the broker, which arises in course of their business together, is in truth and in fact *a loan by the broker to the customer.*

The account (Exhibit 701) shows numerous items of *interest* charged to Greene by the brokers, showing unquestionably that the brokers were *advancing* the money to Greene. This stamps the account as a speculative or "margin" account, and not an

outright purchase by Greene of the securities with monies or means *independent* of the securities handled in the course of business.

In the nature of things, then, the securities handled were purchased with the monies of the brokers, and the payments made from time to time by Greene to the brokers were on account of his indebtedness to them for margins and not for the purchase of the stocks or securities themselves. The sources from which such payments made by Greene to his brokers were drawn is not shown anywhere. There is no evidence on the subject, and the claim that they were the monies of which it is alleged Greene defrauded the United States is a bare and bold assumption.

That the identical checks alleged to have been received by Greene in the "division" of the "spoils" were not turned over to Lee, Livingston & Co. is obvious from the fact that no single payment made by Greene to the brokers corresponds in amount with any single payment made to Greene in the "division."

Manifestly, then, the checks received by Greene in the "division" must have been deposited by him in some bank or other institution in which he had an account, and there is not a spark of evidence showing what the state of Greene's bank account or accounts was or were when such deposits were made by him. In the face of the fact that not a single check which Greene is alleged to have received in the "division" corresponds in amount with any payment made by him to the brokers, it is impossible to trace the stolen monies into the securities *without following them through the bank or banks in which Greene deposited them when received.* When, for instance, Greene received, as is claimed, a check on July 3, 1893, for $12,900.04, he must have deposited the check therefor in some bank. He made no payment corresponding in amount to his brokers, and the mere fact that he may subsequently have made a payment less in amount to his brokers falls far short of proof that the payment so made was part of the money so received. It was necessary for the Government at least to show where Greene

deposited the checks alleged to have been received by him and what was the state of his account at the time of each such deposit with the bank in which he made it. The want of such showing constitutes a fatal breach in the chain of evidence the Government endeavors to forge, and exposes the lack of an indispensable link.

In Order to Follow Funds Into Other Property Claimed or Sought to be Charged it is Necessary to Identify the Funds.

Board of Commissioners v. *Strawn*, 157 Fed. 49.
City Bank v. *Blackmore*, 75 Fed. 771.
Amer. Can Co. v. *Williams*, 178 Fed. 420.

In *Board of Commissioners, &c.*, v. *Strawn, supra*, Lurton, J., said:

> "It is, therefore, a part of the rule applicable to following misappropriated money into a bank account that if at any time during currency of the mingled account the drawings out had left a balance less than the trust money, the trust money must be regarded as dissipated except as to this balance, the sums subsequently added to the account from other sources not being attributed to the trust fund." (p. 51.)

And again:

> "That the misuse of this trust fund has gone to swell, in one form or another, the general assets of the bank is not enough to charge the whole with a lien, will not be seriously contested. The cases which deny such contention are numerous. To impress a trust upon the property of a tort-feasor who has used the trust fund in his private affairs, it must be traced to its original shape or substituted form (citing cases). In other courts, the question has been presented more squarely for a decision, and supports the rule that an identification of the fund itself, or a tracing into some specific property, is essential to reach the property of a wrong-doer, either in the hands of an

assignee, trustee, receiver, or under a lien fastened by a creditor." (Citing numerous cases.) (p. 54.)

In *City Bank* v. *Blackmore*, 75 Fed. 771, Judge Taft, delivering the opinion of the Court, said:

> "It may not be necessary to show earmarks upon the proceeds of the thing parted with to justify such a remedy, but it must at least appear that the funds in the hands of the receiver were increased or benefited by the proceeds, and the recovery *is limited to the extent of this increase of benefit.*
>
> "In every case relied upon by counsel for appellant, recovery, if decreed, was based on the fact that the property in the hands of the assignee or receiver or the person or bank against whom the claim of fraud, right to rescind, and priority of distribution was made, included in its mass either the very thing parted with or its proceeds." (p. 773.)

In *American Can Co.* v. *Williams*, 178 Fed. 420, the Court said:

> "While the right to follow misappropriated funds into the hands of a receiver has been extended in the modern decisions, *there has never been in the Federal courts a departure from the principle that there must be some identification of the property followed with the trust funds.* Some of the latest cases say that it is sufficient to show that the property in the possession of the receiver has been increased or augmented by the trust funds. But that is only a different way of stating the earlier rule. . . . If the plaintiff's contention be well founded, and to follow misappropriated monies it is only necessary to show that the receiver has, and the trustee had, assets, the rule is simply that a demand for such monies is a preferred claim against any substantial estate. To adopt this view is to do away with all of the equitable principles out of which the right to follow trust funds grew." (p. 423.)

If, however, notwithstanding the foregoing argument, it should be assumed as was done by the Circuit Court of Appeals

without passing upon the evidence, and equally so if it should be found that the N. & W. stock was purchased with diverted funds or with the proceeds of reinvestments thereof the Leary estate may yet maintain its claim as will now be demonstrated.

KELLOGG AS TRUSTEE FOR LEARY IS A BONA-FIDE HOLDER OF THE NORFOLK & WESTERN STOCK WITH AN EQUITY THEREIN SUPERIOR TO THE CLAIM OF THE UNITED STATES.

In the original bill the United States distinctly realized and recognized the necessity of bringing home to the holder of the stock in controversy "full notice" of the alleged fact that it was purchased with money of which the Government had been defrauded.

Thus in paragraph VII (Rec., p. 27) it was charged that all the monies fraudulently obtained from the United States by Greene constituted in the hands of *all persons taking or holding the same with notice of such fraud*, a trust fund for the benefit of the plaintiffs.

And it was further charged (Rec., p. 31) that the firm of Kellogg, Rose & Smith, of which Kellogg was a member, were of counsel for Carter in certain court-martial proceedings, and by and through said proceedings Kellogg had "full notice" of the alleged fraud.

And again (Rec., p. 33) we find the distinct averment and charge that Kellogg had full notice of the fraud set forth in the bill, and full notice that by reason of said fraud the assets in his hands constituted a trust fund for the benefit of the plaintiffs.

And among the prayers of the bill (p. 34) is one to the effect that the Court will decree the delivery of all the investments within the jurisdiction of the Court, into which the funds so entrusted to Carter as disbursing officer and so fraudulently diverted to the use of Greene as aforesaid had gone, in the hands of all persons *taking the same with notice of the fraud*, etc.

Thus plainly the plaintiffs' own conception of their rights was that it was necessary to affect with "full notice" all parties from whom it sought a recovery of the funds or the proceeds thereof of which the United States claim to have been defrauded.

As already pointed out, the plaintiffs relied on such notice as Kellogg was supposed to have received while the firm of which he was a member were of counsel for Carter in certain court-martial proceedings.

In this connection it is only necessary to point out that Kellogg in his answer denied any notice, and to refer to the only evidence on this point, the deposition of Kellogg, in which he testified (Rec., p. 117) that he had no knowledge of the sources from which the securities deposited with him were acquired other than the fact that they were turned over to him by Greene as the owner thereof; that the securities were received by him (Kellogg) in absolute good faith and without suspicion or notice of any flaw or taint in Greene's title, or any fraud in their acquisition, or any adverse claim whatsoever.

It is further alleged in the bill (p. 33) that the firm of Kellogg & Rose represented Green and Gaynor in certain proceedings looking to their removal to Georgia for trial; that Kellogg took personal part in the examination and cross-examination of witnesses; that in the conduct of the removal proceedings Kellogg & Rose had admitted "*in judicio*" that the proof had established the fact that the proceeds of certain fraudulent contracts had been divided with Greene, Gaynor, and Carter; that Kellogg & Rose claimed "*in judicio*" that the evidence showed that Wescott was partner with Greene and Gaynor in government contracts, and further claimed that the gift of such proceeds of the contracts by Wescott to Carter was not a crime; and in so making the said claim, the bill alleges, Kellogg & Rose had "full notice" that Greene, Gaynor, and Carter had denied in the court-martial proceedings that Wescott was at any time interested in said contracts as a partner with

Greene and Gaynor or otherwise; and it is further alleged that by reason of the removal proceedings Kellogg was likewise put on notice of the fraud complained of in the bill.

A sufficient answer to this allegation, independently of the testimony of Kellogg denying such notice, lies in the fact appearing on the face of the bill (p. 31), that Greene and Gaynor were arrested *not until December 11, 1899*; that they were *then* committed to await a warrant of removal to Georgia for trial; that the Judge held the matter under advisement "some months," *and not until June 26, 1900*, made an order *referring the case to the Commissioner to take evidence*; that the hearing before the Commissioner began July 6, 1900, and was continued to December 23, 1900.

It is distinctly averred in the bill that it was *during this hearing* that the United States were enabled through the greater effectiveness of the processes of the *civil* courts to obtain evidence unknown to the United States until then.

The point to be borne in mind in this connection is that Greene and Gaynor were not arrested until December 11, 1899, and that the taking of evidence before the Commissioner *could not have begun until after June 26, 1900*, whereas the stocks were placed in the hands of Kellogg, to indemnify Leary for becoming his bondsman "in the matter of the *United States* v. *Greene, Gaynor, and Others*," *on December 14, 1899*.

Thus it plainly appears by the plaintiffs' own showing that any notice which Kellogg may have gotten during the progress of the hearing of the removal proceedings must have come to him *more than six months after the stocks were turned over to him*.

Plainly, therefore, the effort of the United States to affect Kellogg with notice that the stocks turned over to him by Greene were purchased with monies belonging to the United States failed most signally.

LEARY'S ESTATE WOULD BE ENTITLED TO CHARGE THE STOCKS FOR ITS INDEMNITY EVEN IF GREENE HIMSELF HAD RETAINED THEM IN HIS POSSESSION AND EVEN IF THEY STOOD IN HIS NAME INSTEAD OF KELLOGG'S.

But Kellogg was really a useless and unnecessary intermediary, and might have been eliminated altogether in the transaction. It was only necessary that the stocks should be set apart and identified with an agreement and understanding that they should stand for Leary's indemnity. And so even if the United States had succeeded in affecting Kellogg with notice that the stocks were purchased with the proceeds of money of which Greene had defrauded the United States, it would have been an immaterial circumstance. See *Sexton* v. *Kessler*, 225 U. S. 90.

The case just cited is strikingly in point and completely upsets more than one of the contentions of the United States in this case.

The facts in the case cited were as follows:

A bill was brought by a trustee in bankruptcy to set aside an alleged fraudulent preference. The Circuit Court of Appeals reversed a decree of the District Court for the plaintiffs and dismissed the bill. The appellee was an English company, and the bankrupts a New York firm intimately connected with it which for many years had drawn upon it. Some time afterwards the English house requested the New York firm *to set aside securities for their drawing credit*. The New York firm wrote in reply that they had that day placed in a separate package *in their safe deposit vault* certain securities named, the package being marked, "Escrow for account of Kessler & Co., Limited, Manchester"; adding, "This escrow is intended as a protection against our long drawings against your good selves." This letter was acknowledged by the English house; and it was added, "If at any time you have the opportunity to realize these securities, or any part of them, *you are at liberty to take them and to replace them by others of*

equal value, though in that case we should, of course, like to see rather better quality." Subsequently the English house suggested the form of certificate as follows: "We certify that we have specially set aside and hold for your account, on this, the 31st day of December, 1903, as security for the drawing credit which you accord us, the following securities. Name securities and market value." This was conformed to. *Substitutions were made from time to time* and the English house notified. On October 25, 1907, the stability of the New York house being in doubt, it handed over the escrow securities to an agent of the English company then in New York and he deposited them in a safe deposit vault in the name of the company. On November 8th a petition of bankruptcy was filed, and on November 27th the New York firm was adjudged bankrupt.

The Court said:

> "Notwithstanding arguments to the contrary, it may be assumed that the arrangement between the parties was made in good faith and intended and believed to be valid, and, on the other hand, that at the time of the change of custody, on October 25th, within four months of the petition, the New York firm was insolvent, and that the English company had reasonable cause to believe that a preference was intended if its rights began only on that date.
>
> "So far as the interpretation of the transaction is concerned, it seems to us that there is only one fair way to deal with it. The parties were business men, acting without lawyers, and in good faith attempting to create a present security out of specified bonds and stocks. Their conduct should be construed as adopting whatever method consistent with the facts and with the rights reserved is most fitted to accomplish the result. If an express declaration of an equitable lien, or, again, a statement that the New York firm constituted itself the servant of the English company to maintain possession for the latter, or that it held upon certain trusts, or that a mortgage was intended, or any other form of words, would effect what the parties meant, we may assume that it was within the

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> import of what was done, written, and said. So the question is whether anything in the situation of fact or the rights reserved prevents the intended creation of a right *in rem*, or, at least, one that is to be preferred to the claim of the trustee."

And, holding that there was no rule of local or general law that took from the transaction the effect it was intended to produce, this Supreme Court decided that the English house was entitled to the securities.

The Court's attention is particularly directed to the fact that this Supreme Court assumed that at the time of the change of custody of the securities on October 25th, which was within four months of the filing of the petition in bankruptcy, the New York firm was insolvent, and the English house has reasonable cause to believe that a preference was intended if its rights begun only on that day. In other words, *the delivery of the securities by the New York firm to the agent of the English house counted for naught*. The thing that *did* count was *the intention* on the part of the New York firm to set apart and retain *in its own custody* for the indemnity of the English house the securities in question and the attempt in good faith thereby to secure the English house—the Court holding that a mortgage or pledge being *intended*, effect should be given to that *intent*.

In Mr. Erwin's brief in the case in hand in the trial court he said:

> "If this were a bankruptcy case, such stock so held by Kellogg could be recovered from him by summary proceedings."

The contention of counsel for the United States then was that if Greene were a bankrupt the trustee in bankruptcy could successfully assert claim to the stocks in controversy and make them part of Greene's estate. Conceding that the claim of the United States in this suit may be fairly tested by that criterion,

we vouch, as a conclusive answer, the unanimous opinion and decision of the Supreme Court in *Sexton* v. *Kessler, supra.*

It should be matter of great gratification that the highest Court of the land thus sets so luminous an example in the administration of justice. For ourselves, we welcome it as the bracing dawn of a new era in which transactions between man and man are no longer viewed with "flaw-seeking eyes like needle points," but the *intention* of the parties is the law of the case, except only when, in the interest of public morality and policy, such intention can not be permitted to stand.

In this very case, speaking of Mrs. Leary's intervention, this Court said:

> "We are of opinion that any one reading the bill *in the same way that he would read an untechnical document* would have no doubt that the plaintiff *meant* to put her case as we have taken it."

By the same token, we submit, this Honorable Court should delight in viewing the transaction with reference to Leary's indemnity as evidently *the parties intended it and understood it.* It contravenes no rule or principle of public policy, and there is no reason why the understanding should not be respected and given effect.

The Leary estate would be entitled, under the agreement as the parties understood and intended it, to be indemnified out of the Norfolk & Western stocks even if Greene himself had retained them in *his* possession—even if they stood in his name instead of that of Kellogg. It was only necessary that the stocks should be set apart and identified, with an agreement and understanding that they should stand for Leary's indemnity.

It follows, therefore, that even if the United States had succeeded in this case in affecting *Kellogg* with notice that the stocks were purchased with the proceeds of money of which Greene had defrauded the United States, it would have been an immaterial circumstance. But it seems to us that the United

States have utterly failed to convict Kellogg of such notice. *Evans* v. *Mansur, etc., Co.*, 87 Fed. 275.

Leary Had the Highest Equity—That of a Bona-Fide Purchaser for Value

who is a purchaser?

In the Note to *Basset* v. *Nosworthy*, Vol. 2, Part 1, White & Tudor's Leading Cases in Equity (4th edition), at page 32, the learned annotators make this statement:

> "Every one is a purchaser within this rule who gives value or changes his position for the worse, under a belief that the vendor is entitled, which is justified by what appears at the time, although the event shows it to be ill founded."

That Leary "changed his position for the worse" under the *belief* that the stocks were dedicated to his indemnity for so doing, it is impossible to doubt. That *he* had any notice, or any reason to suspect, that the stocks were bought with money of which the United States had been defrauded by Greene is not even charged, much less shown. Nor can such notice be presumed, because if the pledged stocks had been purchased with funds of which the United States had been defrauded, and Leary had known it, he would have been a party, not only to a fraud, but to a crime. Fraud and crime are never presumed.

Indeed, the very fact that Leary did go on the $40,000 bond is of itself the strongest proof, not only of the understanding that the stocks were pledged for his protection, but also that he did not suspect that the Government had any claim to or against the stocks. It is confidently submitted that there is nothing in this entire record which makes it possible for this Court to doubt either proposition.

The assignee of a chose in action takes it subject to the equities between the assignor and obligee only. He does not

take it subject to any equity of *a third person* of which he has no notice. See the leading cases of *Moore* v. *Holcombe*, 3 Leigh 597, and *Mott* v. *Clark*, 49 Amer. Dec. 566, 569. In the latter case the Court said that the rule that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor is understood to mean the equity residing in the original obligor or debtor, *and not an equity residing in some third person against the assignor*; that he takes it subject to all the equities of the obligor because he can always go to the debtor and ascertain what claims he may have against the bond or other chose in action which he is about purchasing, but that he may not be able with the utmost diligence to ascertain the *latent equity of some third person* against the obligee; that he hasn't any object to which he can direct his inquiries, and that *for this reason* the claim of the assignee without notice of a chose in action is preferred to that of a third person setting up *a secret equity against the assignor*.

The Court cites in support of this doctrine *Norton* v. *Rose*, 2 Wash. 233, and *Redfearn* v *Ferrier*, a case decided by *Lord Eldon*, in which that great Chancellor observed that if this were not so, no assignment could ever be taken with safety; that it would be utterly impossible to guard against combination by the mortgagor and mortgagee, particularly with the aid of the owner of the latent equity.

Leary's Position as a Complete Purchaser for Value Without Notice

The consummated agreement on the part of Leary to go upon the bail bonds of Greene in the matter of the United States against Greene in consideration of the agreement for indemnity, constituted Leary a purchaser for value of the stock in question to the extent necessary to indemnify him against loss by reason of the obligations assumed, and there is no higher equity than that of a purchaser for value without notice.

It does not appear that Leary knew, or had any reason whatever to suspect at the time of making this indemnity agreement,

that any monies of the United States had been invested in this stock. On the contrary, it appears that Leary was not connected in any way with Greene, and Kellogg himself, who was in a far better position to have notice or knowledge than was Greene, has filed his affidavit, which the United States has agreed may be treated as his deposition, in which he testified that he did not know and had no reason to suspect that Greene was purchasing this stock with monies diverted from the Government.

The certificates of stock stood in the name and were in the possession of Kellogg, who admittedly was the attorney for Greene. Suppose, in this state of the case, Kellogg had himself endorsed on the certificates of the D. L. & W. stock that he held them as indemnity to Leary. Would this not have been a complete pledge of the stock that certainly could not have been called in question by any one? Could it make any difference that instead of writing it on the certificate itself, he wrote it on a separate sheet of paper in the form of the letter of December 14, 1899? So, likewise, if after the Norfolk & Western stock came into his possession, Kellogg had endorsed thereon the fact that this stock was held as the Leary indemnity, would not Leary's equity therein have been likewise complete? This must be equally true when the recognition of this equity in this stock in favor of Leary was made by Kellogg both contemporaneously in letters and afterwards in his sworn answer in this suit, and in his assignments of error.

The equity of Leary was none the less an express equity because of the substitution of the Norfolk & Western stock for the D. L. & W. stock, and the situation was not affected by the fact that the possession of the stock was held by Kellogg. *Sexton* v. *Kessler*, 225 U. S. 95, 56 Law. Edition, 999.

The legal title and possession being in Kellogg, as trustee and depositary for Leary, made Leary's position that of a purchaser for value in a court of equity. First Pomeroy on Equity Jurisprudence, 3d Edition, paragraph 414, page 691, and paragraph 417, page 694. Pomeroy cites as typical of the doctrine

here applicable, the leading case of *Thorndyke* v. *Hunt*, 3 De Gex & Jones, 563, 570, and 571. In that case, as collected in the syllabus, it was held: A trustee of two different settlements having applied to his own use funds subject to one of the settlements, replaced it by funds which, under a power of attorney from his co-trustee under the other, he transferred into the names of himself and his co-trustee in the former. In a suit in respect of breaches of trust of the former settlement, the trustees of it transferred the fund thus replaced into Court upon a motion. Held, that the transfer was equivalent to an alienation for value without notice, and that the *cestuis que trustent* under the other settlement could not follow the trust fund. *Thorndyke* v. *Hunt, and Brown* v. *Butte*, 3 De Gex & Jones Reports, 563.

In *Thorndyke* v. *Hunt* the diverted fund had not reached the hand of the purchaser, but had only been paid to the auditor of the Court, who thus *quoad* the purchaser was only a trustee or depositary, as was Kellogg, when the *cestuis que trustent* from whom it had been diverted came into the suit and set up an equity, which they in effect alleged was prior in time and right to him for whom the fund was held by the Court's auditor. Yet the Court sustained the claim to a better right on the part of him toward the satisfaction of whose debt the fund had been admittedly diverted, and paid into the hands not of him, but of the Court's officer.

So in *Bowen* v. *Evans*, 1 J. & L. 264, Lord Chancellor Sugden said that in his opinion whether the purchaser has the legal estate or only an equitable interest, he may, by way of defense, avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title. See note to *Basset* v. *Nosworthy*, Second White & Tudors Leading Cases in Equity, 4th American Edition, at page 16, and cases there cited.

No Burden of Want of Notice on Leary

Though, as is pointed out above, the United States recognized in drawing the original bill that in charging that Kellogg had notice of the alleged taint on this title to the stock it must allege, as it undertook to do, the facts from which he derived notice, yet the answer to the intervention bill contains only this general and wholly insufficient allegation of notice to Leary (Rec., p. 86):

> "and that said Leary was on full notice at the time he became bail for said Greene, on said $40,000 bond executed January 20, 1902, that he could not acquire any interest in said stocks except subject to the antecedent equities of the United States existing therein, and which antecedent equities and rights in said stock existed in the United States by reason of the facts averred in complainants bill in the main cause, which are made a part of this answer."

As Leary was neither mentioned nor referred to in the original bill, these references thereto in the answer could not serve to supply the necessary allegations of facts constituting the notice charged.

The United States apparently noticed the omission and now too late seeks to supply some such allegation of fact in its twelfth assignment of error (Rec., pp. 155-156) where it is suggested that Leary was put on notice by a reference in the bail bond of January 20, 1902, to certain evidence taken before the commissioner.

Further, turning to the bond (Rec., pp. 72, 73, and 74) nothing will be found therein to put Leary on notice either that the D. L. & W. stock formerly held or the N. & W. stock then held by Kellogg was purchased with stolen funds, nor does the United States suggest any other evidence whatever tending to affect Leary with notice.

Indeed, the record will be searched in vain for any testimony tending to support the insufficiently pleaded allegation that

Leary was put upon notice either when the bond of December 14, 1899, or that of January 20, 1902, was given.

This being true, it is immaterial whether the question of such notice is decided as of the former or of the latter date because it must be held upon the record that Leary was wholly unaffected by notice.

Likewise as to the assignment of error as to the burden of proof in this regard being upon the Leary estate all the evidence tends to show that Leary acted in good faith and without knowledge or notice of any taint upon the title to either the D. L. & W. or N. & W. stock.

The Government apparently renews its contention made on the previous appeal that the intervenor should have alleged—and, therefore, should have proven—the want of notice of her intestate of the alleged defect in Greene's title to the securities. It is sufficient to add that this contention was overruled by this Court, which held that the intervention as first offered, without any such allegation of want of notice, was entirely sufficient. The Government has offered no evidence whatever tending to affect Leary with notice, and certainly until such evidence was offered by the Government there could be no burden upon Leary.

THE ALLEGED OLDNESS OF THE EQUITY OF THE GOVERNMENT

While it is true that in a sense the intervenor claims an equity in the stock, it is also true—and this fact is apparently overlooked by the learned counsel for the Government—that coupled with that equity the intervention sets up and the record establishes that Kellogg, as trustee for Leary, held also the legal title; and it is only where no other considerations apply that the older equity in time is deemed better in right. Here the intervenor had both an equity and by her trustee had also the legal title. 16 Cyc., pp. 138-139.

Neslin v. *Wells*, 104 U. S. 428 (26 L. Ed. 801, 807).
Dueber Mfg. Co. v. *Dougherty* (Ohio), 57 N. E. 455.
Pomeroy's Equity, Vol. I, Sec. 414.

The Vigilance of the Government

Where a claimant must depend upon the greater vigilance of another claimant to establish a right, the more vigilant claimant may sometimes be given priority. Here the intervenor needed not the vigilance of the Government, because Kellogg, the holder of the stock, stood ready to apply it for the benefit of intervenor, and would have done so but for the injunction obtained by the Government at the time of the institution of this suit; so that the vigilance of the Government bore no fruit for the intervenor, but, on the contrary, was intended to obstruct the intervenor, as it did.

That the intervenor was not in *laches* was settled upon the previous appeal. *Leary* v. *U. S.*, 224 U. S. 567; 16 Cyc., p. 140.

Leary's Equity Express

The equity of Leary is an express equity and as such is entitled to priority over that of the United States, which, if it exists, is only a latent equity.

Upon this branch of the case also it is submitted with entire confidence that the decree of the Circuit Court of Appeals was clearly right and should be affirmed.

IV

Greene Was Not a Necessary Party to the Bill of Intervention, Nor Is the Absence of a Decree "Pro Confesso" Thereon Against Greene and Kellogg a Bar to the Claim of the Leary Estate.

If, as the Government contends, its decree *pro confesso* against Greene, entered long before the bill of intervention was offered, had entirely cut off all interest that Greene had in the impounded stock, upon what meritorious ground can it be urged that it was necessary to make him a party to a controversy about a subject in which it had been thus already decreed that he had no longer any interest? While it may have

been proper to have given Greene an opportunity—as the court below did give him—to be heard upon the questions raised by the intervention bill at the time of the tendering thereof, it is not perceived upon what ground he would have been heard to contest at that late day the right of the Government to the stock, and nothing is ventured in saying that if he had then sought to come in, and, by negativing Leary's claim, had endeavored to assert rights of his own in the stock, he would have been met by the Government with the contention it now makes that the decree *pro confesso* against him had entirely cut off any claims that he might assert to the stock.

The learned counsel for the Government said, at page 19 of his brief in the trial court, that it was not necessary that the order, to show cause, should have been served upon Greene, who had not appeared in the main suit, although it was in the sound discretion of the Judge to afford Greene an opportunity to voluntarily appear in the matter, an opportunity of which Greene did not see fit to avail himself.

If this were true as to the original intervention, why was it less true as to the intervention as amended? If Greene was not a necessary party to the original intervention, neither was he a necessary party to the amended intervention.

We confess that we have difficulty in following the learned counsel for the Government in his apparent effort to persuade himself and the Court, in one part of his brief, that Greene should have been made a party to the intervention as well as to the appeal taken from the order of the court below refusing leave to file the same; while in other parts of his brief he as earnestly contends that by the decree *pro confesso* entered years before the intervention was offered, every distinct allegation of the bill was taken as confessed, and a decree made accordingly cutting off Greene from all further interest in the *res*. What boots it, then, that Greene was not made a party to the intervention, and of what avail would a decree *pro confesso* against Greene upon the intervention have been as against the plaintiff? Of equal futility would have been a decree *pro confesso* against

Kellogg, a party to the original suit, who in his answer first filed had in substance admitted and expressly pleaded an equity of the intervenor, and who, even in his amended answer, does not deny that equity, but only omits any reference to its having been continued.

To sum up, the contention of the Government that the decree appealed from should be reversed because Greene was not made a party to the previous appeal, and because no decree *pro confesso* against him was taken by the intervenor, should be overruled because:

1. It comes too late.

2. Greene was not a necessary party to the intervention, this being a suit *in rem* in which by the decree *pro confesso* taken by the plaintiff against Greene all interest that Greene might have had in the *res* was cut off.

3. Greene actually had all the notice that, and even more than, is required of the intervention by the due service upon him in person (admitted on page 19 of the brief for the United States in the Circuit Court of Appeals) of a copy of the petition and proposed bill of intervention, together with a copy of the order of the Court citing him to show cause "against the granting of leave to file said petition and the granting of the prayers of said petition," the same order declaring that "such service of copies shall be sufficient service to entitle the Court to proceed herein and to adjudicate upon the filing of said petition and the prayers thereof." (Rec., p. 150.)

The amended intervention differed in no material respect affecting Greene adversely from the intervention as first offered, and a copy of which was duly served upon Greene, who besides, as a party to the suit, was presumed to take notice of interventions filed therein.

Foster's Federal Practice, Vol. I (4th Ed.), pp. 668-669, and cas. ci.

Central Tr. Co. v. *Madden* (C. C. A., Fourth Circuit), 70 Fed. Rep. 451.

Kellogg's Claim

We do not understand that Kellogg seeks to deny the claim of the intervenor set up in her bill of intervention, nor that as the case now stands he is asserting any personal claim to the fund involved in this litigation, except to the extent that he may seek an allowance to himself as trustee of counsel fees and expenses for protecting the fund and discharging his duty as custodian thereof.

So far from the contentions of Kellogg being adverse to intervenor, his assignment of errors in the Circuit Court of Appeals (Rec., p. 135) asserts that Kellogg held the securities in question as trustee for the benefit of the estate of the said James D. Leary, deceased, thus reasserting the contention made in his original answer (Rec., p. 52) that the said Norfolk & Western stock was held upon a contract to indemnify Leary for becoming security on the said bail bond for $40,000.

Since the claim set up by Kellogg to an allowance as trustee would, if sustained, still leave sufficient funds to meet the demands of the intervention, the intervenors do not feel called upon to take sides in that controversy as between Kellogg and the Government.

Kellogg, as the trustee for Leary and as the holder of the legal title to the Norfolk & Western stock, was entitled, and it was his duty to defend against the claims of the Government. Whatever effect the decree *pro confesso* taken by the plaintiff against Greene may have had as against Greene, it would not oust Kellogg of the right to make any defense that he might make in his own right or as the trustee for Leary.

It was, therefore, competent for Kellogg to deny that diverted funds went into the securities in question, and to require the same proof thereof that Greene or Leary might have required. If the Government failed to trace its alleged diverted funds into these securities, the default of Greene in setting up a claim which he knew he could not maintain against Leary and Kellogg, even though he might have sustained his right as against the Government, would not preclude the intervenors

from insisting successfully that such default of Greene could not be held against the intervenors. Therefore the Leary estate may, as it does, ask that so much of the assignments of error and argument that have been put into the record by Kellogg, its trustee, as tend to support the claims set out in the intervention, may be read and considered in that behalf.

THE DECREE OF THE UNITED STATES AS AGAINST KELLOGG

The contention of the United States, that the United States as against Kellogg was entitled to the decree entered without proof, might be admitted to be sound if Kellogg had held the stock in trust only for Greene; but it is a begging of the question to say that because a decree might be taken against Kellogg for the interest that Greene had in the stock based upon the decree *pro confesso* against Greene, therefore, a decree might also be taken against Kellogg for the interest that the Leary estate had in the stock. It is submitted that the authorities relied upon by the learned counsel for the United States go no further than this, that if the holder be a mere trustee for an admitted sole beneficiary, then a decree against the beneficiary carries with it also the estate and title of the trustee.

The argument of the Government in this relation based upon the omission from Kellogg's amended answer of an allegation that the indemnity agreement was extended to the forfeited bond, appears to go upon the assumption that the extent of the interest of Kellogg in the stock, as well as the title by which he holds the same, is to be determined exclusively by what he may say about it. If this be true, then under the terms of Kellogg's original answer Leary's estate is entitled to the equity in the stock set out therein; and if this is not true, the intervenors are as free to assert their rights, notwithstanding the failure of Kellogg to set out the equities of the Leary estate in his amended answer, as is the United States to contend that nothwithstanding the admission and claim of Kellogg

to hold as a trustee for Leary in his original answer, it may show—as it contends that it has shown—that Kellogg did not hold the stock subject to the equities set out in his original answer, but that he held it as a mere trustee for Greene, and as such was bound by the decree *pro confesso* against Greene in favor of the Government to deliver the stock to the United States.

The defense set up by Kellogg in his original answer was made not alone for Greene, but was also made as well for the Leary estate; and the trustee, by mere amendment of his answer, in the omission therefrom of the allegations of his trusteeship for Leary, could not thereby deprive the Leary estate of the equity in the stock to which it was in fact entitled.

Decree "Pro Confesso" Against Kellogg Upon the Intervention Unnecessary

Nor is the absence of a decree *pro confesso* against Kellogg upon the intervention material because (a) He had notice both of the intervention and of the amended intervention with the opportunity to appear and he did appear. (b) Both in his original answer and in his assignments of error in the court below he concedes the equity of the Leary estate. (c) The fund is more than sufficient to satisfy both the claims of the Leary estate and of Kellogg and therefore their interests do not conflict.

The Circuit Court of Appeals with Kellogg before it conceding in his assignment of errors and in his brief of argument the equity of the Leary estate rightly found that the absence of a decree *pro confesso* against Kellogg in the trial court upon the intervention did not bar its decreeing upon the rights of the parties thus both before it, and what it rightly did, it is respectfully submitted, this court should affirm.

Intervenors do not deem it necessary further to enlarge upon the failure of the plaintiff to trace the alleged diverted funds into the Norfolk & Western stock, nor upon the entire absence of any evidence on behalf of the plaintiff tending to show

knowledge on the part of Leary of the alleged fraudulent conversion. The charge against Greene was not that he had converted railway company stock, but was that he had conspired to defraud the United States out of certain sums of money. It was the duty of Leary neither to presume the guilt of Greene nor acting upon that presumption to suspect that Greene had invested the fruits of his alleged crime in the particular stocks pledged to Leary's indemnity.

KELLOGG'S ANSWERS

Kellogg's answer to the original bill was filed March Rules, 1904 (Rec., p. 42), and therein he states unequivocally that the agreement for Leary's indemnification was extended to cover the $40,000 bond (Rec., p. 52). This language imports that the extending of the agreement was made by those competent to make it, and it is idle to contend that the language used is insufficient.

That Kellogg afterwards chose to offer an amended answer, omitting the averment as to the agreement to indemnify Leary having been extended, can not affect the intervenors, for it will be observed that this amended answer was received only as between the United States and Kellogg, and was filed without the consent of the Leary estate (Rec., pp. 86-99-101). It, therefore, can not be read against intervenors.

The solemn admission by the trustee and holder of the legal title made upon the record under his oath, sustaining the equity of Leary's estate, is not to be set aside by any subsequent act of the trustee without the consent of the beneficiary.

Kellogg's Answer, Affidavits and Assignment as Evidence

The Appellant's twenty-fifth assignment of error is (Rec., pp. 158-9):

> "That the said Circuit Court of Appeals erred in holding and decreeing the original answer of Luther Laflin

> Kellogg, verified March 1, 1904, to the bill of complaint was to be treated on the final hearing on the merits as an affidavit and evidence against the United States and in having so treated it, there being no stipulation so to admit it as evidence, and answer under oath having been waived in the bill of complaint."

On the previous appeal this Court held, *Leary* v. *United States*, 224 U. S. 567, 56 Law. Ed., at page 892:

> "The leave to intervene may be granted, subject to the condition that the evidence already in shall be taken to be evidence against her, subject to her right to recall and cross-examine such witnesses for the Government as she may be advised."

Prior to that, and before the intervention was offered Kellogg had filed his answer "in the form of an affidavit for use in the said cause." (Rec., p. 53), which as its first paragraph set out. "1—That this answer is made under oath and is intended to be used at once as an answer, and in season as an affidavit in any sort of proceedings." (Rec., p. 42.)

In the stipulation on appeal between solicitors for the United States and the Leary estate it is stipulated (Rec., p. 3):

> "The defendant, L. L. Kellogg, filed a demurrer to the bill, and also filed and offered at said hearing his affidavits in the nature of an answer to the averments of the bill."

Kellogg had also testified as a witness and was cross-examined by counsel for the United States on December 21, 1905 (Rec., pp. 118 to 120).

After the intervention was filed, under a stipulation between solicitors for the United States and Kellogg, October 27, 1913 (Rec., p. 116), without notice to the Leary estate, another affidavit of Kellogg was allowed to be "offered in evidence on the trial of this case with the same force and effect as if the testimony contained therein had been given in open court or before an examiner pursuant to notice."

In the light of the foregoing and other facts appearing in the record it is submitted that the Circuit Court of Appeals properly gave consideration to Kellogg's answer, affidavits and assignments because:

(1) He was a party in interest whose admissions should be received.

(2) As attorney for Greene and trustee for Leary his acts and admissions were material to the issues.

(3) By its course of dealing with Kellogg as a party to this suit the United States is estopped to deny consideration to his answer, affidavits and pleadings filed herein.

Finally as to this assignment it is submitted that the decree of the Circuit Court of Appeals should be affirmed even if the consideration that it gave the answer of Kellogg be eliminated from the determination here of the issues raised by the record.

The Decree of the United States Against Leary

Here again the learned counsel for the Government apparently fails to distinguish between the case where a suit is brought as an original proposition to enforce an equitable lien when it is proper and necessary to make all of the persons having or claiming an unadjudicated interest in the *res* parties to the proceeding and the case at bar. The former would have been the case here, it may be admitted, if Greene had not been already cut off by the decree *pro confesso* against him by which both the cause as to him and his interest in the *res* ended. As the case stood, when the intervenor offered her intervention, the suit was ended as to Greene, because some years before the offering of the intervention the decree *pro confesso* against Greene had been entered and he was no longer dealt with as a party to the suit, or as having any interest in the impounded securities, which, as the cause then stood, were treated as the property of the United States, subject only to such interests in

them as had been set up by the defendant Kellogg in his own right and as trustee for Leary. To say that the United States was entitled to a decree against Leary because it had taken a decree against Greene—which is, in substance, the argument advanced—would be simply to deny the right to file the intervention, which the Supreme Court has held was entirely sufficient upon an appeal to which Greene was not a party, and upon which no exception was taken by the Government to the fact that Greene was not a party thereto.

It is submitted that the cases under this head of the discussion, cited in the brief for the United States in the Circuit Court of Appeals, are not adverse to the contention here advanced, but, on the contrary, an examination of them discloses that in none of them, after a decree in proper form had been taken, cutting off every interest of a party, was that party a necessary party to any proceeding asserting further claims. It is true that in the case of a mortgagor sued upon a mortgage, after a decree fixing the amount of the mortgage debt has been entered, the mortgagor would be a necessary party to any proceeding the result of which might increase the sum decreed against him. Such was the case of *Davis* v. *Mercantile Trust Co.*, 152 U. S. 590, cited on page 42 of the brief of the Government in the Circuit Court of Appeals, in which case it is pointed out that the reason for making the mortgagor a party to the appeal is that he has a direct interest therein because of the chance that a larger sum might be decreed against him. No such fact or possibility obtains here. The interest of Greene was, by the decree *pro confesso*, not only partly cut off as to the extent of a debt, but, by the very contention of the Government, was entirely cut off, and no proceeding thereafter, by any other claimant of the fund, could in any degree further diminish his interest which had already disappeared in its entirety.

THE CASE UPON THE MERITS

It is submitted that the judgment of this Court allowing the intervenor to file her intervention as she had offered it, was a

finding by this Court that her intervention set up a right in the fund involved in this litigation, which, if sustained, by proof of the allegations of the intervention, entitled her to the relief that she prayed for therein. She should not be defeated now by questions raised for the first time after long years of litigation as to the effect of the decree *pro confesso*, which was in the record when the previous appeal was prosecuted, or by the failure to make Greene a party to the intervention or to this appeal, whose absence from the case upon previous appeals was noted neither by counsel nor the Court.

In the last analysis, the case comes back to the simple question recognized as controlling by this Court in giving intervenor a chance to prove her case, and that is, did Leary have a contract of indemnity upon the bail bond in question, and if he had such a contract, was the Norfolk & Western stock, which has been impounded in this suit, the indemnity fund contemplated by the parties to the transaction?

In considering this question it is the right of the intervenor to have the issue tried as if the controversy were between her intestate and Greene. That is to say, eliminating for the purposes of the immediate discussion—as it is submitted upon the record should altogether be eliminated—all question as to Leary's knowledge or notice of Greene's alleged defalcation, and of his investments of the fruits thereof in the indemnity fund, if the controversy were solely between Greene and Leary would Greene be heard either to deny that he had contracted to indemnify Leary, or that the Norfolk & Western stock was the fund in contemplation, as pledged to Leary's indemnification?

The contention of the Government upon the merits as against the intervenor should be overruled because:

1. The diverted funds have not been traced into the impounded securities with sufficient certainty.

Schuyler v. *Littlefield*, 220 U. S. 707 (58 L. Ed. 806).

2. Leary was not affected with notice of the alleged equity of the United States.

3. The record establishes the contract of indemnity set up in the intervention and supports the claim of the intervenor to a better equity in the N. & W. stock than that asserted by the plaintiff.

V

CONCLUSION

The decree appealed from should be affirmed and the cause remanded to the District Court with directions to allow the claim set up in the intervention, and to decree the repayment out of the impounded money and securities to the intervenors of the full amount of the judgment with interest upon the forfeited bail bond that has been paid by the Leary estate, and of the intervenors' costs in this suit and with such directions as to the disposition of the residue of the fund as to this Court may appear proper.

Respectfully submitted,

J. T. Coleman, Jr.,
Aubrey E. Strode,
Solicitors for Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, Appellees.

Office Supreme Court, U. S.
FILED
SEP 29 1917
JAMES D. MAHER
Clerk

Supreme Court of the United States

OCTOBER TERM, 1917—No. 194.

THE UNITED STATES,
Appellants,

vs.

DANIEL J. LEARY and GEORGE LEARY, Administrators of James D. Leary, deceased, LUTHER LAFLIN KELLOG and NORFOLK & WESTERN RAILWAY COMPANY,
Appellees.

BRIEF FOR APPELLANTS.

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Eaton on Eq., Sec. 210, *p.* 439	91
2 *Pomeroy's Eq. Jr., 2nd Ed., Sec.* 1053, 1051, 1076, *p.* 1598	89-91

Supreme Court of the United States

THE UNITED STATES, Appellants, vs. DANIEL J. LEARY and GEORGE LEARY, administrators of James D. Leary, deceased, LUTHER LAFLIN KELLOGG and NORFOLK & WESTERN RAILWAY COMPANY, Appellees.	October Term, 1917 No. 194.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal by the United States from a decree of the United States Circuit Court of Appeals, 4th Circuit, of November 12, 1915, reversing a decree of the District Court of the United States for the Western District of Virginia, of December 13, 1913, which had awarded to the United States the ownership free from the claims of all other parties to the suit, of 400 shares of Norfolk & Western Railway Company stock with accumulated divi-

dends, as constituting investments made by Benjamin D. Greene with fraudulently diverted trust funds. The reversing decree having declared that the legal representatives of the estate of James D. Leary, deceased, intervenors in the main suit, are entitled to a claim thereon superior to that of the United States.

The Bill of Complaint.

The original bill (Rec. p. 11) was filed December 19th, 1903, by the United States against Benjamin D. Greene, Luther Laflin Kellogg and the Norfolk & Western Railway Company, among other things to subject 400 shares of the stock of the Norfolk & Western Railway Company of the par value of $40,000.00 standing in the name of Luther Laflin Kellogg on the stock books of the company to the claims of the United States as being an investment made with diverted trust funds belonging to the United States.

It is averred in the bill that the defendant Benjamin D. Greene, conspiring with Oberlin M. Carter, John F. Gaynor and others, defrauded the United States out of a large amount of money which had been entrusted to Oberlin M. Carter, a disbursing officer, for river and harbor improvements, in the Savannah engineering district under his charge as engineer officer of the United States, by methods and schemes which are set out with great particularity in the bill. The particular con-

tracts under which the frauds were charged to have been committed are described, and the means for accomplishing the frauds are also fully described.

In the sixth paragraph of the bill the manner in which it is charged the money entrusted to Carter as such officer was fraudulently diverted and divided between Greene, Gaynor and Carter, is set out with particularity.

In the seventh paragraph of the bill it is averred that in the divisions made between the chief conspirators Carter, Greene and Gaynor covering the period from January 3, 1893 to July 7, 1897, Benjamin D. Greene received $722,528.23 as his share of the fraudulent profits of the contracts, and attached to the bill as Exhibit E is a statement setting forth in detail the dates on which the different amounts of money are charged to have been so received, the respective amounts, a description of the respective contracts on which the money is charged to have been fraudulently paid on Carter's disbursing checks, the share thereof retained by Greene, and the aggregate so received and retained by said Greene.

The same paragraph contains the averment:

> "Your orators file herewith as Exhibit F a table setting forth certain of the proceeds of said fraudulent profits from the share of the same retained by said Benjamin D. Greene aggregating $113,926.55 which have been traced into the possession of said Luther Laflin Kel-

logg to which table the usual leave of reference is prayed."

Exhibit F referred to (Rec. p. 37-38) purports to set out with descriptive detail certain moneys and stocks charged to have been transferred by Greene to Kellogg from Oct. 12th, 1898, to Nov. 5th, 1901, alleged to have been part of the diverted trust funds, the sale of the said securities by Kellogg through a broker, and reinvestment of the proceeds in other stocks in Kellogg's name, among others in 500 shares of stock of Norfolk & Western Railway Co., 400 shares of which constitute the shares of said Norfolk & Western stock, which, with accumulated dividends is the principal subject matter of the present controversy between the various parties.

In the eighth paragraph of the bill a summary of the legal proceedings which had been had in the prosecution against Carter, Greene and Gaynor respectively are recited, to-wit:—

The proceeding of the Board of Inquiry in 1897 which investigated Carter's conduct in the matters involved. The Court martial trial of Captain Carter in 1898. The affirmance of Carter's conviction by the President in September, 1899. The indictment of Greene and Gaynor in the United States District Court for the Southern District of Georgia, December 8, 1899, for conspiracy with Carter to defraud the United States, as substantially set forth in this bill. The arrest of Greene and

Gaynor in December, 1899 in the Southern District of New York, and proceedings had before Commissioner Shields under section 1014 R. S. to remove them to Georgia for trial, on which a large amount of testimony was taken, and on which probable cause of defendant's guilt was found by the commissioner, and warrant for removal was issued by the District Judge.

It charges that defendant Kellogg was a member of the firm of Kellogg, Rose & Smith, which represented, as attorneys, Oberlin M. Carter in the court martial trial, on which Captain Carter had been convicted, and of the succeeding firm of Kellogg & Rose which represented Greene and Gaynor in the removal proceedings before Commissioner Shields, and that Kellogg personally examined and cross-examined the witnesses and took a personal part in the general conduct of the removal proceedings.

It is charged that Kellogg, by reason of his connection with these various proceedings, was on full notice of the commission by Greene of the frauds charged in the bill and facts disclosed by those records. It is then specially averred: (Rec. p. 33).

> "Your orators aver and charge that in order to prevent your orators from recovering from the said Benjamin D. Greene, the large amount of investments into which he had diverted the said money of the United States so fraudulently obtained, the said Benjamin D.

Greene set about concealing the same by making other people the holders thereof but secretly for his benefit and your orators aver and charge on information and belief that among the assets so concealed were and are the assets described on Exhibit F hereto, as received and handled by the said L. Laflin Kellogg for account of said Greene, and particularly the said 400 shares of the common stock of the Norfolk & Western Railway Co., certificates numbers 5896, 5897, 5898, 11077, 74200, which shares still stand in the name of the said L. Laflin Kellogg on the books of said Railway company. And your orators aver and charge that all of said assets described in Exhibit F, were so received by the said L. Laflin Kellogg with full notice of the fraud set forth in this bill, and with full notice that by reason of said fraud the said assets were held by the said Benjamin D. Greene as a trust fund for the benefit of your orators."

Besides prayers for restraining orders, injunctions, subpoenas, and general relief the bill contains the following prayer: (Rec. 34).

"That the court will in due course by its final decree, declare all of the aforesaid investments within the jurisdiction of the court, into which the funds so intrusted to said Oberlin M. Carter as disbursing officer and so fraudulently diverted to the use of said Benjamin D. Greene as aforesaid, in the hands of the defendants and of all persons holding the same for the benefit of said Benjamin D.

Greene or taking the same with notice of the fraud, are together with the income, properties held in trust for orators and will decree a delivery of the same or proceeds thereof to your orators, or a conveyance of the same to your orators, or a sale of the same and delevery of the proceeds to your orators as the nature of the case and justice may require. And that your orators may have a personal judgment against the said L. Laflin Kellogg for the amount of all of said trust funds traced to him which he may fail to account for."

The bill expressly waived answers under oath from each and all of the defendants (Rec. 34).

It was averred in the bill that Greene is a citizen of the State of Connecticut temporarily residing in the City of Quebec, Canada, that Kellogg is a citizen of the State of New York residing in the City of New York, and that the Norfolk & Western Railway Company is a corporation of the State of Virginia, having its principal place of business at Roanoke, Virginia. The bill was filed in the Western District of Virginia, under the principles recognized by this Court in *Jellinik vs. Huron Mining Co.*, 177 U. S., 1.

Proceedings Subsequent to the Filing of the Bill

Equity subpoenas were duly issued (Rec. p. 3). The Norfolk & Western Railway Company was duly served, and filed its answer admitting that

the 400 shares of stock in controversy stood on its books in the name of L. Laflin Kellogg and submitted itself as a stake-holder to orders and decrees of the Court.

Greene and Kellogg were not found in the District for service, and an order of the Court was made in terms of the statute requiring them respectively to appear, demur, plead or answer to the bill on or before March Rules, 1904, and directing publication of the same and service of a copy of the said order on the said non-resident defendant wherever found, as by the statute in such case made and provided. Publication was so duly made and personal service of said order was made upon said Kellogg in New York, and also upon said Greene in Quebec, Canada, on Jan. 18th, 1904, as shown by the record. (Rec. p. 3.)

Decree Pro Confesso Against Greene.

Benjamin D. Greene failed to appear, demur, plead or answer to the bill, at the time designated in said order or at any other time and in due course, to wit, at the April 1904 Rule day of the Court, a decree pro confesso was duly entered in said cause against him. (Rec. p. 3).

Kellogg's Appearance and Demurrer.

Kellogg appeared and demurred to the bill (Rec. p. 39) generally and specially, and after argument heard, the Court overruled the demurrer June 2nd, 1904. (Rec. p. 53.)

Kellogg's First Answer.

In his first answer to the bill (Rec. p. 42) Kellogg admitted the fact of the various proceedings against Greene mentioned in the bill and Kellogg's participation as attorney therein, but denied the conspiracy and fraud charged against Greene, and denied notice thereof to himself. He admitted the fact that Greene had placed the securities mentioned in the bill in his hands and admitted or claimed that he had subsequent to the removal proceedings allowed Greene to carry on a speculative account in his, Kellogg's name, but he claimed that he had accounted to Greene for all the securities which came into his hands except the 400 shares of Norfolk & Western stock, which he admits he still holds.

He then sets up or attempts to set up a right in himself to hold the 400 shares of Norfolk & Western stock. He sets up that when James D. Leary became surety for Greene in December 1899 on a temporary bond in the sum of $25,000.00 for appearance before the Commissioner on the hearing then going on before the Commissioner, Kellogg agreed by an instrument in writing to indemnify Leary against loss on that bond. (He does not state therein the real fact which he subsequently states in his amended answer that that bond became exonerated and *functus officio* on February 20, 1900) and he avers that at that time December, 1899, Greene placed with him, Kellogg, cer-

tain securities to indemnify Kellogg for Kellogg's having so indemnified Leary and for fees and expenses of Kellogg and his firm in defending Greene or caring for his interest in any proceeding brought by the United States against him in which said Greene was interested, pending in respondent's office, and that the deposit was made by Greene with the right to withdraw the securities so deposited and substitute others.

That from time to time the securities were withdrawn and others substituted and that the Norfolk & Western stock was such a substitution.

He then avers that on January 20, 1902 Greene entered into another recognizance in the sum of $40,000 after the conclusion of said removal proceedings for appearance of said Greene in Georgia. That he holds said 400 shares of Norfolk & Western stock as a *bona fide* holder as *security to himself* for his fees and because of the obligation he is under to Leary "the agreement to indemnify Leary having been extended to cover said last mentioned bonds."

It will be observed that Kellogg's first answer did not attach a copy of the alleged written indemnity agreement given Leary in December 1899.

It will be observed also that he made no positive averment that he had at the time of Leary's going on the bond of January 20, 1902, agreed to indemnify Leary as to that bond. He simply avers as a conclusion that he holds the Norfolk &

Western stock as a *bona fide* holder, the agreement to indemnify Leary "having been extended to cover said last mentioned bonds." He failed to state who extended it. It required an express agreement of both Leary and Kellogg to extend it, and if Greene's bonds were sought to be pledged it required Greene's express agreement.

U. S. *v.* Ryder, 110 U. S., 729.

The vague language "having been extended" is no averment of such an agreement. In his amended answer Kellogg struck out all averments of this alleged extension.

KELLOGG'S AMENDED ANSWER.

The amended answer of Kellogg filed October 4, 1913 (Rec. p. 86), undertakes to repeat the same defenses to the merits as to Greene's rights as against the Government's claim as Kellogg had set up in his original answer, *i. e.*, he denied the conspiracy and frauds charged against Greene, and denied notice thereof to himself. He admitted (Rec. p. 96) the fact that Greene had placed the securities, mentioned in Exhibit F to the bill, in his hands and admitted or claimed that he had, subsequent to the removal proceedings, allowed Greene to carry on a speculative account in Kellogg's name, but he claimed that he had accounted to Greene for all the securities which came into his hands except the 400 shares of Norfolk & Western stock, which he admits he still holds.

The amended answer sets out (Rec. p. 98) the alleged indemnity contract given James D. Leary by letter of Kellogg to him December 14, 1899, on the temporary bail bond of December 14, 1899, but avers that that bond had been exonerated on Feb. 20, 1900 (Rec. p. 97), and the securities mentioned in the letter had been delivered up to Greene on March 23, 1900, and sold (Rec. p. 98). The copy of the letter of December 14, 1899, from Kellogg to Leary set out in the answer, after referring to the fact that Leary had become bondsman for Greene in the pending proceedings is merely a statement of a deposit on December 14, 1899, by Greene with Kellogg of 300 shares of Delaware, Lackawanna & Western R. R. stock, without other description, on the understanding that

> "I am to hold these until you are released from the *said* bond, or in case that your liability should be established, that it is to be applied to the intervenor's intestate James

That was purely a statement by Kellogg that he held said securities as a depositary and at best created no obligation on him other than as a depositary for the purpose stated, and the amended answer avers that even that obligation had been ended when the temporary bond was exonerated on February 20, 1900.

The amended answer also averred (Rec. 98) that:

"Other stocks of said Greene which were in this defendant's custody were sold at or about that time and part of the proceeds thereof were re-invested in 500 shares of Norfolk & Western stock. That thereafter said Greene withdrew 100 shares of said Norfolk & Western stock, leaving only the certificate for 400 shares of said stock in this defendant's hands."

In said amended answer there is absolutely no averment of an agreement or understanding at the time of the execution of the recognizance of January 20th, 1902, or in connection therewith either as to the Norfolk & Western stock being held as security for fees or for indemnity either to Kellogg or to Leary.

There is no averment in the amended answer of Kellogg that anything was due to Kellogg or his firm by Greene for fees, disbursements or otherwise.

The amended answer leaves Kellogg on his own averments as a holder of Greene's stock as a naked depositary for Greene, without any personal claim thereon whatever, either in his own behalf or for Leary.

The Evidence Taken Prior to Leary's Intervention.

There was a stipulation entered into on December 21, 1905, between the United States and the defendant Kellogg, described as Stipulation No. 2, (Rec. p. 126) by which the certified copy record of the evidence taken before Commissioner Shields

in the removal proceedings in the case of U. S. *v.* Benjamin D. Greene, *et al.*, which was identified and filed in the present cause with the stipulation, should be received as evidence as if taken before an Examiner or the Court in this cause. The testimony of R. F. Westcott in that record was excepted from the operation of the stipulation except that it was admitted that he did so testify, and the right of the United States to offer his testimony, and the right of the defendant to object to it was preserved.

The same stipulation identified certain accounts of bankers and brokers designated as Exhibits 700 to 718, inclusive, and the affidavits verifying the same, and stipulated that the said affidavits and copy accounts should be admitted in evidence as if taken under examination and cross-examination before an Examiner in the cause, and without the necessity of producing the original books or documents. The stipulation provided that either party could take additional testimony.

All of the testimony in the removal proceedings and Exhibits 700 to 718 above mentioned were offered and admitted in evidence at the trial in the trial Court (Rec. p. 5, paragraph 7), and are sent up with the Transcript in this appeal as a supplement thereto under stipulation (Rec. p. 6, par. 8).

The testimony in the removal record consisting of three printed volumes and a large number of exhibits, is very voluminous. There is a stipulation in the record entered into by all the parties to

the appeal from the trial Court which admits on the part of the Intervenor and Kellogg that certain facts are established thereby. See paragraph (9) of stipulation of February 27, 1914 (Rec. p. 6). That admission is as follows:

> "It is stipulated that for the purposes of this appeal, that it is conceded by the Intervenor that the testimony taken on the aforesaid removal proceedings and offered in evidence in this case, even independently of the testimony of R. F. Westcott, fully establishes the conspiracy between the said Benjamin D. Greene, Oberlin M. Carter and others, as charged in the bill, and the frauds committed by them in said Government contracts as charged, and that fraudulent profits of said contracts were divided between the contractors and said Carter as charged, and that said divisions of said profits between said Benjamin D. Greene, John F. Gaynor and Oberlin M. Carter were as stated in paragraph VII of complainant's bill, and as shown more in detail in Exhibit E to complainant's bill, and that the aggregate amount of said fraudulent profits received for his share by said Greene was $722,528.03.
>
> And it is conceded by the Intervenor that the transactions purported to be set out in Exhibit F to complainant's bill were had as therein stated; but she does not concede that 400 shares of Delaware, Lackawanna & Western stock mentioned therein as having been sold through A. W. Kilbourne & Co. for account of said L. L. Kellogg on March 23, 1900,

were purchased with any of the said funds wrongfully obtained from said complainant by said Greene, or with the proceeds of investments or reinvestments of said funds by or on behalf of said Greene; or that the proceeds of the said 600 shares of Canada Southern Railway Co. stock referred to in said Exhibit "F" as having been sold on the 23rd day of March, 1900, through A. W. Kilbourne & Co. for the account of Luther Laflin Kellogg or the proceeds of the 100 shares of the Canada Southern Railway Co. stock mentioned in said Exhibit F as having been sold on the 26th day of March, 1900, through A. W. Kilbourne & Co. were invested in whole or in part directly or indirectly, in the shares of Norfolk & Western Railway Co. stock involved in this suit.

It is understood that the matters above stated as not conceded by the Intervenor, the Government reserves the right to contend are fully established by the evidence."

These admissions were made by Kellogg also (Rec. p. 136).

As we shall point out later, the complainant's Exhibits 700 to 781 furnish the data by which the money which purchased in the name of Kellogg for Greene the Norfolk & Western stock in controversy is traced from and shown to be a part of the $722,528.03 admitted to have been fraudulently acquired by Greene through the conspiracy with Carter, and the two records together trace and follow the fund from the very disbursing checks

fraudulently issued by Carter into the Norfolk & Western stock.

There was also certain testimony taken December 21, 1905, on the part of Kellogg, to wit, the testimony of said Kellogg and his clerk Franklin Nevius (Rec. p. 118-120). This testimony in connection with another stipulation (Rec. p. 121) entered into December 21, 1905, described as Stipulation No. 1 of that date, between the United States and Kellogg was filed in the record of this case on January 1, 1906. The general effect of that testimony and stipulation showed (a) that Kellogg had been paid all the fees, costs and expenses due him or his firm out of the assets he held for Greene, and (b) that he had fully accounted to Greene just prior to the filing of the bill for all the assets in his hands claimed by the Government in its bill, with the exception of the Norfolk & Western stock.

It eliminated from the issues all claims of the complaints against Kellogg except for the Norfolk & Western stock.

It is stipulated between all the parties to this appeal (Rec. p. 5) that the record stood in that situation ready for trial when the Intervention of Leary was filed on April 18th, 1908.

LEARY'S ORIGINAL PROPOSED INTERVENTION (Rec. 55-61).

Mary C. Leary, Administratrix of James C. Leary, to her petition for leave to intervene, filed

April 18th, 1908, attached her proposed bill of Intervention, which averred that Leary became surety for Greene in December, 1899, on the temporary bail bond for appearance before the Commissioner hereinbefore referred to, and the deposit at that time by Green with Kellogg of 300 shares Delaware, Lackawanna & Western stock, on the understanding that Kellogg was to hold it in trust until Leary was released from said bond or in case that Leary's liability thereon should be established that said shares should be applied in payment of the obligation assumed by Leary. That pleading failed to state the fact subsequently pleaded in Kellogg's amended answer that that temporary bail bond became *functus officio* and exonerated on February 20th, 1900.

That intervention also averred that Greene withdrew from Kellogg's hands the 300 shares of D. L. & W. stock and substituted the 400 shares of N. & W. stock, but it does not state when that was done.

It then averred the execution of the bond or recognizance for $40,000.00 of January 20th, 1902, by Greene with Leary as security, for appearance of Greene in Georgia and which bond, signed by Leary, recites the taking of the evidence in the removal case, the finding of probable cause of Greene's guilt by the Commissioner *and that he had on May 28th, 1901, been taken into custody by the Marshal, and prosecuted a writ of habeas corpus.* These averments of the Intervention

show, as matter of law, that the temporary bail bond for appearance of Greene before the Commissioner had long prior to January 20th, 1902, become *functus officio.*

> 3 A. & E. Enc. Law, 2nd Ed. 718, and cases cited.

The intervention then set out in its fifth paragraph:

> "That thereupon said Benjamin D. Greene and his said attorney Luther Laflin Kellogg applied to the intervenor's intestate James D. Leary to become surety upon said bail bond of $40,000, which said James D. Leary agreed to do upon the condition and understanding that the securities held in trust or on deposit as heretofore alleged by the defendant Luther Laflin Kellogg, should remain and continue in the hands of the said Luther Laflin Kellogg as security and indemnity to the said James D. Leary for signing said bail bond of $40,000 for the appearance of said Greene in Georgia for trial upon said indictment,
>
> "That upon such understanding and agreement the said James D. Leary the intervenor's decedent did on or about the 20th day of January, 1902, jointly with the defendant Benjamin D. Greene make, execute and deliver the said recognizance."

The Intervention sets out the recognizance in full (Rec. p. 57). The recognizance recites the

charge against Greene *et al.*, and proceedings before Commissioner Shields, the taking of the testimony in the removal proceedings, and the finding of probable cause of Greene's guilt, the issue of the warrant of removal and its affirmance by the Supreme Court.

Said original intervention then set out the proceedings by which the $40,000.00 bond was forfeited and the judgment obtained by the United States on the bond in New York, and claimed the 400 shares of Norfolk & Western stock on Leary's claim to it as superior to that of the United States. That was the case made by the original intervention.

The Failure of Leary to Make Valid Service on Greene.

As already stated, the record shows that Benjamin D. Greene was not a resident of Virginia, and was not found therein for service even of the equity subpoena upon him. The Government effected service upon him out of this District and by publication of an order strictly in accordance with the provisions of Section 8 of the Act of 1875, fixing the date when he was to appear, and in due course took a decree *pro confesso* when he failed to appear. He has never appeard in the case. Consequently the proceeding is entirely in *rem* against the property.

When Mary C. Leary presented her petition for

leave to file her bill of Intervention, Judge McDowell on April 17, 1908 (Rec. p. 62), passed an order that the United States, Greene, Kellogg and the Norfolk & Western Ry. Co. show cause on May 30, 1908, "against the granting of leave to file said petition and the granting of the prayers of said petition," and said order further provided that a copy of the petition and proposed bill of Intervention be served upon Benjamin D. Greene, if practicable wherever found; and be served 10 days before May 30, 1908,

> "and such service of copies shall be sufficient service to entitle the Court to proceed herein and to *adjudicate upon the filing of said petition* and the prayers thereof."

There was no order for service by publication of a "suit commenced" as required by Section 8 of the Act of 1875. Nor any provision in the order requiring Greene to appear, plead, answer or demur to the bill of intervention by a day certain to be designated. It was simply an order to show cause why a suit should not be allowed to be commenced as against Greene by the filing of a proposed Intervention.

Although it does not appear in the record on this appeal, we admit, because it is a fact, that the record in the Court below does show that a copy of the above order was served on Greene out of the District on the 28th day of April, 1908, in the Northern District of Georgia.

It would have been entirely competent for the Court to have allowed the filing of the intervention *ex parte*, it was not necessary that the above mentioned order to show cause should have been served upon Greene who had not appeared in the main suit, although it was within the sound discretion of the Judge to afford Greene an opportunity to voluntarily appear in the matter, an opportunity of which Greene did not see fit to avail himself.

Subsequent to May 30, 1908, to wit, July 20, 1908, the Court on objections of the United States passed an order denying leave to the proposed Intervenor to file said Intervention (Rec. p. 65). Mary C. Leary, Administratrix, appealed from that order January 7, 1909 (Rec. p. 2). She did not make Greene a party and the United States was the only appellee to that appeal. This is sufficiently shown by the citation and appeal bond.

> Davis v. Mercantile Trust Co., 152 U. S., 590-594.

The order of July 20th, 1908, denying leave, was therefore final as to Greene, although not res judicata, since it would not have prevented the Court subsequently from allowing Mary C. Leary to file an Intervention, and making new service thereof in accordance with Section 8 of the Act of 1875.

> Credits Com. Co. v. United States, 177 U. S., 311.

The Supreme Court on the appeal above referred to, reversed the order of July 20, 1908, and allowed the filing of the intervention on terms (Leary vs. United States, 224 U. S. 567), but that reversal could only affect the United States, the only party made appellee. The mandate of the Supreme Court was made the judgment of the lower Court May 20, 1913, and leave granted said petitioner "to file herein said bill of Intervention, etc." (Rec. p. 68) and on the same day she was allowed to amend her Intervention.

LEARY'S AMENDED INTERVENTION (Rec. pp. 68-76).

The amended Intervention, filed May 20, 1913, is simply a repetition of the averments of the original intervention except that it contains in the 4th paragraph an excerpt of Kellogg's original answer to the bill contained in paragraph XXVI of that answer, saying that Kellogg had so answered, without averring whether the statements of Kellogg therein were true or false. Those statements conflict with what Leary sets up as the alleged agreement or understanding. If true, it put Intervenor out of Court as to the Norfolk & Western stock in controversy, since Kellogg claims therein that the deposit therein was to indemnify him for fees and because of the obligation he had assumed to Leary, and therefore Leary's administratrix can take nothing by reason of copying that paragraph of Kellog's original answer in her intervention.

Certainly nothing averred in Kellogg's original answer could operate as an estoppel against the United States or even be considered as evidence admissible against the United States since answer under oath to the original bill was expressly waived.

The amended intervention however contained the additional averment that the intervenor had on or about December 31, 1910, paid the judgment obtained by the United States on the bail bond of January 20, 1902, amounting with principal and interest to $40,802 (Rec. p. 75). It also prayed a personal judgment against Kellogg if intervenor failed to recover the stock.

No order was obtained for substituted service on Greene under Section 8 of the Act of 1875 of said old Intervention, nor of said amended Intervention after the orders of May 20, 1913, and Greene never appeared in either the main or Intervention suits at any time.

No order having been obtained and served under Sec. 8 of the Act of 1875, requiring Greene to "appear, plead, answer or demur" to the bill of Intervention or amended bill of Intervention, "by a day certain to be designated" and no service of such an order made or attempted, the Intervenor was never in a position to take a decree *pro confesso* against Greene, so as to be entitled to proceed *ex parte* as to him.

No Decree Pro Confesso.

The record does not disclose that any decree *pro confesso* was ever taken against either Greene or Kellogg on the bill of Intervention, or amended intervention, and none was ever taken.

Section 8 of the Act of 1875 provides, that upon failure of the non-resident to appear, plead, answer or demur within the time limited, and proof of service or publication of the order:

> "It shall be lawful for the Court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the *same manner* as if such absent defendant had been served with process within the district," etc.

The Equity Rules 12 and 18 then of force required the defendant to enter his appearance and to plead, demur or answer within the time limited after the return day of service, or that in default thereof, the plaintiff might at his election take a decree *pro confesso* against him. The 19th Rule provided:

> "When the bill is taken *pro confesso* the Court may proceed to a decree at any time after the expiration of *thirty days* from and *after the entry of the order* to take the bill *pro confesso*," etc.

No such order was taken or could have been taken on the Intervention because no order had

been made or served fixing a time within which Greene was to appear, demur, plead or answer to the bill of Intervention. The Intervenor claiming only under an alleged contract between Greene and Leary an equitable interest in the assets as an indemnity or security, went to trial, without legal service on Greene or any appearance by him or any decree *pro confesso* on her bill of intervention entitling her to proceed *ex parte* as to the claim she asserts only through the rights set up as against him.

Intervenor Offered No Evidence to Sustain Her Claim That There Was an Indemnity Agreement Between Leary and Greene Relative to the Bail Bond of January 20, 1902.

The only evidence offered by Intervenor, were four letters from Kellogg to James D. Leary, set out in the record (Rec. pp. 113-114), and testimony tending to prove their admissibility. None of these letters related to the bail bond of January 20, 1902. These letters bear date December 14, 1899; January 19, 1900; May 21, 1901, and June 6, 1901. Their admission in evidence was objected to by the United States on various grounds (Rec. pp. 105-106), but they were admitted by the Court (Rec. p. 112).

Outside of those letters Intervenor relied wholly upon such facts averred in her Intervention as

were admitted in the answer thereto of the United States and upon the averments of the original answer filed by Kellogg to the Governments bill, although the Government had waived answer under oath in that bill. Kellogg filed no answer to her intervention and no decree *pro confesso* was taken thereon as to him, and no personal jurisdiction was acquired on the intervention over him (Rec. pp. 78-79).

The answer of the United States (Rec. pp. 79-80) admits that James D. Leary became bail for Greene on the following described bail bonds:

Bond ~~Nov. 28, 1901, $25,000~~ Dec. 14/00 $20,000. for appearance of Greene before Commissioner Shields. Exonerated Feb. 20, 1900.

Bond of Feb. 20, 1900, $25,000 for appearance of Greene on application for removal warrant before Judge Addison Brown. Exonerated May 28, 1901.

Bond of ~~December 11, 1899, $20,000~~ May 28/01 $25.000. for appearance of Greene before United States District Court in Georgia. On which Leary as surety surrendered up Greene to the custody of the marshal on June 8, 1901, and it is averred (Rec. p. 83) that:

> "thereupon the said bail bond so given by said Leary as bail for said Greene became and was exonerated, and all claims of said Leary for indemnity, whether of said Greene or from said Kellogg or on any property in their hands, if any such ever existed had become ended and terminated on June 8, 1901."

The answer then avers (Rec. p. 84) that Greene sued out a writ of habeas corpus before the United States Circuit Court on June 8, 1901, which sustained the validity of his custody, and this judgment was affirmed on appeal by the Supreme Court of the United States, and the mandate of the Supreme Court was made the judgment of the Circuit Court on January 17, 1902, and on January 20, 1902, James D. Leary became surety on the recognizance or bail bond for $40,000 of that date for appearance of Greene in Georgia.

The answer then avers (Rec. p. 84):

> "And these respondents on information and belief deny that there was any agreement on the part of the said Greene or of any one else competent to bind him, with the said Leary at the time of the giving of said bail bond of Jan. 20, 1902, or in connection therewith, by which any securities held in trust or on deposit by said Kellogg for Greene should remain and continue in the hands of said Kellogg as security and indemnity to the said Leary for signing said $40,000 bail bond of January 20, 1902."

The answer admits (Rec. p. 84) that the copy of the bail bond set out in the Intervention is a true copy of the original except that the original recites that the application for writ of habeas corpus was made June 8, 1901, instead of May 28, 1901, as recited in the copy. Said answer denies (Rec. p. 81) knowledge of the alleged indemnity

contract set up in the intervention, even as to the first bail bond, and requires that the Intervenor make strict proof of the same if the averments as to the same be deemed material, and it avers that the only shares of stock of the Delaware, Lackawanna & Western Railroad Company which the said Kellogg received from said Greene and which Kellogg had in his possession in December, 1899, were 400 shares which Kellogg sold through A. W. Kilbourne & Co., brokers, on March, 23, 1900, after the bail bond of Dec. 14, 1899, had been exonerated. It denies any substitution of other stocks by Greene for the Lackawanna stocks to be held as indemnity as averred in the Intervention. It avers (Rec. p. 82) that the Norfolk & Western stocks were purchased by Kellogg through Kilbourne & Co. on March 26, 1900, with the proceeds of securities held by Kellogg for Greene *other than the Delaware, Lackawanna & Western* stocks, there being 500 shares of Norfolk & Western stock purchased at that time at the price of $18,812.50.

The answer admits (Rec. p. 84) the forfeiture of the bail bond of January 20, 1902, and the judgment for $35,377.46 against Leary on the bail bond, and the payment Dec. 31, 1910, of the principal and interest amounting to $40,802.

Said answer alleges the claim of the United States to the Norfolk & Western stock as set out in the original bill, and that Leary was on full notice of the claims of the United States thereto at

the time he became surety on the bond of Jan. 20, 1902 (Rec. p. 85).

Neither by any admission in the answer of the United States or by any evidence, documentary or oral, was any proof offered that there was any indemnity agreement made by Greene with Leary relative to the bond of January 20, 1902, upon which she predicated her alleged equities.

The admissions of Leary and of Kellogg in the stipulation of February 27, 1914, as to the effect that the evidence of the removal record established the guilt of Greene of the conspiracy and frauds charged in the bill and of the transactions shown by Exhibits E. and F, thereto, made the case of the Governments' right to a recovery complete as against Greene and Kellogg even on strict proofs, needing only an examination by the trial court and by the Circuit Court of Appeals of the accounts and documentary evidence sent up as exhibits to the removal record and as blue print exhibits 700 to 718 before referred to, to trace the fund which purchased the 500 shares of Norfolk & Western stock as being a part of the $722,528.03 admitted to have been fraudulently diverted by Greene.

Judge McDowell in the district court made that detailed examination and found the tracing perfect, and awarded to the United States the 400 shares of Norfolk & Western stock and accumulated dividends "free from the claims of all other parties hereto" (Rec. p. 129).

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals (Rec. p. 144) made a part of its decree (Rec. p. 152) finds that the Norfolk & Western shares or securities for which they were substituted were purchased by Greene with funds of which he had defrauded the Government and states (Rec. 144-145):

> "It follows from this that the intervention cannot be sustained on the theory that the United States has failed to prove with requisite certainty that moneys stolen from it are represented by the stock in question."

We thus have the affirmative findings of two courts below on the issue of fact that the evidence fully establishes that the Norfolk & Western stock was purchased by Greene with the diverted trust fund.

This is sufficient to relieve this court of the necessity of examining into the details of the tracings through the accounts, which are voluminous. (U. S. vs. Carter, 217 U. S., 286-301. The Carib Prince, 170 U. S., 655-658. Brainard vs. Buck, 184 U. S., 99.)

As a matter of safety, we have however added under a special sub-heading at the end of this brief, references to the exhibits showing the details of the tracings from the deposits of the disbursing checks issued by Captain Carter into the Norfolk & Western stock.

There was never any serious dispute as to the fact of this tracing. It was contended however by Kellogg's attorneys that the continuity of the tracing had been broken because certain Canadian Southern stocks which had been purchased with the diverted trust funds, had been deposited by Greene with his broker, Lee Livingston, as security to a speculative account and on the closing of the account the same number of shares of the Canadian Southern with different numbers were returned to Greene by the broker "in lieu" of the particular certificates deposited as stated in the account, and from a part of the proceeds of the stocks so returned, sold by Kellogg for Greene through Kilbourne & Co., the Norfolk & Western stocks were purchased. That such substitution by the broker constituted no break in the tracing of trust funds, was expressly held by this court in:—

Richardson, Trustee, vs. Shaw, 209 U. S., 365-366.
Sexton vs. Kessler, 225 U. S., 90-98.

The opinion of the Circuit Court of Appeals states (Rec. p. 148) that Kellogg asserts no personal claim on the record. That (Rec. p. 150) the contest here is between Leary's estate and the Government. Notwithstanding that the bill filed by the United States had waived answer under oath from Kellogg, the opinion (Rec. p. 147) states that the original answer of Kellogg, verified March 1, 1904, to that bill, was to be treated as an affi-

davit. That (Rec. 148) Kellogg had no right to substitute an amended answer to the bill of the United States so far as it affected Leary, and then after reciting the letter which ended in 1901, and the averments of said original answer of Kellogg (Rec. p. 147) to the effect that there was an agreement or understanding at the time Leary became surety on the bond of Jan. 20, 1902, similar to that of 1899, and a substitution of the Norfolk & Western stock for the original Lackawanna stock, the opinion states (Rec. p. 148) :—

> "The foregoing is in substance the proof which Mrs. Leary makes of her right to the stock in question as against the United States."

It also states (Rec. p. 149) :—

> "It is true that no letter is produced which refers specifically to the defaulted bond of Jan. 30, 1902, but Kellogg's answer barely two years later, quoted from above, avers in substance that the agreement to indemnify Leary was extended to cover the $40,000 bond given for Greene's appearance in Georgia after the conclusion of the removal proceedings; and this avernment finds strong support, in the situation then existing and the previous relations of the parties."

The opinion then (Rec. p. 149) discusses the probabilities and cites in support of its conclusion the fact that in his assignments of error to the decree of the Court below Kellogg had alleged

> It was shown in subsequent letters that a subsequent letter, dated [illegible], was received from the office of Messrs. Kellogg & Olney, informing us for the first time that it had been altered by Mr. Hone, which he subsequently stated that there had never been any agreement or any reference in effect to any indemnity to Mr. Leary upon any of the various bail bonds that Mr. Leary had gone on for Mr. Greene, except as was contained in the letter of Dec. 11, 1880. That is the explanation I want to make."

The date of that alleged letter from Kellogg and Hone to Daniel D. Leary was stated by Interveno's counsel to have been January 15, 1881, which was three months prior to the filing of Leary's original petition for leave to intervene.

The foregoing statements in relation made at the trial by counsel for Interveno, which explains why they did not put in those on the deeds to Greene, emphasize the great injustice to the Court of Appeals, upon the United States, by treating Kellogg's original answer as sworn testimony against the United States, thus violating the fundamental rules of practice established by the Supreme Court of the United States, by treating Kellogg's original answer as sworn testimony against the United States, thus violating the fundamental rules of practice established by the Supreme Court of the United States, by treating Kellogg's original answer as sworn testimony against the United States, thus violating the fundamental rules of practice established by the

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more definite method and no more is necessary any other method else neither expressed or it

$722,528.03 during the period from 1893 to July 6, 1897, and the Commissioner and Judge Brown had both held that probable cause of guilt had been established. That removal record shows that at the time of the removal hearing Greene was still presumptively in possession of some $400,000 of securities purchased with a part of the embezzled funds. The bond of January 20, 1902 signed by Leary recites the charge against Greene, the taking of the evidence referred to, and the finding of probable cause. The disclosure of the facts in that bearing had such wide publicity, that they were almost as notorious as a declaration of war, and the recitals of the bond put Leary on notice of all that was in that record. It is utterly inconceivable, that if Leary demanded any security at all that he would at that time have accepted as indemnity for going on a $40,000 bond a deposit of $40,000 par value of Norfolk & Western stock, and which had cost on March 26, 1900 only $15,050 and being a part of a lot of $50,000 par value of said stock purchased on that date (Rec. p. 38) $10,000 par value of the $50,000 lot was sold by Kellogg, for Greene, September 10, 1903 for $6,250 (Rec. p. 125) which was very shortly before the filing of the Government's bill which tied up in Kellogg's hands the remaining $40,000 then worth only about $25,000. It was therefore only a coincidence that the par value of shares of Norfolk & Western stock tied up corresponded to the amount of the bond of Jan. 1902. It is much more probable that James D. Leary demanded and

was paid by Greene in cash the full amount of the $40,000 bond for money has no ear marks. There was money drawn out of Greene's accounts as shown in evidence which could have been applied that way. Nor is it probable that Leary would have even kept a traceable record of so received money under the circumstances. The bond was evidently given by Greene with the full intent as indicated by the event, of testing the indictment on demurrer, and if decided against him, to then flee to Canada, which he did on March 7, 1902 (Rec. p. 74). It does not appear that James D. Leary the bail made any effort whatever to induce his principal to give himself up, or that he in any way concerned himself as a man naturally would who was under a $40,000 liability secured by stock worth at that time less than half that amount.

It is true that Leary died April 11, 1902 (Rec. p. 75) but he had plenty of time after Greene fled to have interested himself personally or through attorneys in the matter. Nor does it appear that his administratrix interested herself in the matter, until 1908, after the Government brought suit against her on the bond, and it does not appear that she had any knowledge relative to any of these transactions other than she might infer from the four letters, the last of which ended in 1901. Not only is the proof totally lacking to show that the Norfolk & Western stock was pledged as indemnity to the bond of January 20, 1902, but the probability is

strongly against it; we insist, notwithstanding the *dicta* on that subject in the opinion of the Circuit Court of Appeals. The dicta in the opinion (Rec. p. 148) that the words "matter of the United States against Greene" used in Kellogg's letter of December 14, 1899 extended the indemnity pledge not only to the bond of that date but to every other bond Leary might become surety on thereafter, is too far fetched to merit serious reply. The letter itself expressly limits it to that particular bond, and to the 300 shares Delaware, Lackawanna & Western stock, and that bond was exonerated February 20, 1900, and that stock sold by Kellogg for Greene March 23, 1900 (Rec. p. 37).

WHY THERE ARE THREE APPEALS IN THE RECORD.

This record presents the anomaly of three separate appeals from what is substantially the same decree of the Circuit Court of Appeal. The reason for this is explained as follows:

Mary C. Leary Intervenor and Kellogg entered separate appeals from the decree of the District Court of December 13, 1913 to the Circuit Court of Appeals.

The appeals of Mary C. Leary administratrix and of Kellogg were by stipulations of Feb. 27, 1914 (Rec. p. 2) and March 31, 1914 (Rec. p. 136) and approval thereof by the District Court (Rec. p. 10) in effect consolidated and sent up as one record. They were, however docketed by the clerk

in the Circuit Court of Appeals as if they were separate causes as Nos. 1277 and 1278 respectively.

Thereafter on February 28, 1915 the solicitors for all parties signed an agreed order entitled under the double heading No. 1277 and 1278, which was approved and entered by the Circuit Court of Appeals, reciting the death of Mary C. Leary administratrix and substituting Daniel J. Leary and George Leary administrators, in her place in both appeals, and treating both appeals as one cause (Rec. p. 142). Thereafter on November 12, 1915, the Circuit Court of Appeals filed its opinion entitled under the double head or title of Nos. 1277 and 1278 reciting among other things (Rec. p. 144) that:

> "Separate appeals were taken by Mrs. Leary and Kellogg, but they are consolidated in a single record, and may be disposed of in one opinion."

Notwithstanding the above the Clerk of the Circuit Court of Appeals on November 12, 1915, entered two separate decrees with the same wording one under title of No. 1277 (Rec. p. 151) and one under title of No. 1278 (Rec. p. 151) each decree reversing the decree of the District Court, thus apparently treating it, as if there were two separate causes in the Circuit Court of Appeals. On December 10, 1915, the United States filed its petition for appeal to this court and assignment of errors entitled under Nos. 1277 and 1278 (Rec. pp. 152-153) and which petition recited that the two appeals

were disposed of by the Court as one cause and treating it as a decree in one consolidated cause, and this appeal was allowed by Circuit Judge Knapp by an order entitled under the double head, 1277 and 1278, and directing one record to be sent up (Rec. 159). Citation was duly issued and served on that appeal (Rec. p. 160).

Thereafter the fact that the Circuit Court of Appeals had on November 12, 1915, entered two decrees of exactly the same tenor, but separately under docket No. 1277 and 1278, was called to the attention of the Attorney General, who for safety directed that additional separate appeals be taken and perfected from each of said decrees so separately entered. Separate appeals were accordingly taken, and perfected, by petition, assignments of error (identical with the first), allowance of appeal and service of citation. There is but one record however for the three appeals. We pray that this Court will consolidate these separate appeals for hearing, and treat the same as one appeal or give effect to the appeal considered to have been properly taken. This appears to be the appropriate procedure where more than one appeal is taken as a matter of safety (Hurst *vs.* Hollingsworth, 94 U. S., 11).

THE SUBSTANTIAL ERRORS ASSIGNED.

We insist:

(a) That there was no evidence to support the Court's finding, that there ever existed any agree-

ment by which the Norfolk & Western stock or any stock was to be held as indemnity for Leary's going on the bail bond of January 20, 1902.

(b) That the evidence relied upon by the Court to sustain that contention, was the original verified answer of Kellogg to the bill, notwithstanding answer under oath was waived, and it is not evidence against the United States.

(c) That the question of notice to Leary and Kellogg of the Government's rights to the stocks in controversy was not to be determined as of December 14, 1899, as held by the Circuit of Appeals, but as of January 20, 1902, when Leary assumed the obligation of January 20, 1902, after the testimony before the Commissioner on the removal proceeding showing Greene's guilt had been taken.

(d) That if Leary acquired any right as against Greene or Kellogg to the Norfolk & Western stock, it was not as a bonafide purchaser for value without notice of the Government's rights and it was subject to the older and superior equity of the United States.

(e) That the Court erred in holding that any relief could be given Intervenor in this proceeding on her Intervention, she having failed to perfect personal service on Greene or Kellogg within the jurisdiction, and no service having been made under

Sec. 8 of Oct. of 1875 (18 Stat. L. 472), or any attempt made to take decrees *pro confesso* against them or either of them.

(f) That the decree of the District Court should have been affirmed, and that of the Circuit Court of Appeals reversed.

POINTS.

I.

The United States as against Greene was entitled to the decree entered without proof.

The allegations of the bill were distinct and positive as to all matters entitling the complainants to the relief granted. The conspiracy and fraud by which Greene diverted to his own account some $722,528.03 of the funds intrusted by the Government to its officer Oberlin M. Carter are set out with great detail, and it is averred (Rec. p. 33) that the 400 shares of Norfolk & Western stock constituted an investment by Greene of a part of the trust funds so fraudulently diverted by Greene.

The suit was properly brought in the Western District of Virginia, and the Norfolk & Western R. R. Co., a Virginia corporation having its home office in that District, and L. L. Kellogg and B. D. Greene, the non-resident defendants, were properly served under Section 8 of the Act of 1875.

Jellinik *v.* Huron Copper Mining Co., 177 U. S., 1.

A decree *pro confesso* was properly taken against Greene after service.

> "When the allegations of the bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs, and a decree will be made accordingly."

Thomson *v.* Wooster, 114 U. S., 111.
Ohio Central R. Co. *v.* Central Trust Co., 133 U. S., 83.
Andrews *v.* Cole, 20 F. R., 411.

II.

The United States as against Kellogg was entitled to the decree entered without proof.

We have already pointed out that the amended answer of L. L. Kellogg admitted that the certificates representing the Norfolk & Western stock were held by him in his own name for Greene simply as a depositary, and set up no claim whatever thereto or thereon, either in his own right or in the right of any person other than Greene.

If therefore complainants were entitled to a decree against Greene on the pleadings without proofs, they were also entitled to have it against

Kellogg who admitted his holding of the stock merely as a depositary for Greene against whom a decree *pro confesso* had been taken.

It is true that Kellogg in his answer undertook to set up a defense to the merits for Greene, but he could not be heard to make that defense.

In *Mueller* v. *Nugent,* 184 U. S., 1, there was a summary proceeding in bankruptcy against an agent who had received assets from his principal, before bankruptcy of the latter, and who admitted the holding, to compel the agent to deliver the same. The agent refused to deliver and denied the jurisdiction to compel the delivery by summary proceedings.

In that case, Chief Justice Fuller for the Supreme Court said (p. 15):

> "The position now taken amounts to no more than to assert a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed and to that we cannot give our assent. * * * (and p. 17). * * * In the case before us, William T. Nugent held this money as the agent of his father the bankrupt and without any claim of adverse interest in himself. If it was competent to deal with Davidson the assignee in the case of Bryan *v.* Bernheimer (181 U. S. 188) by summary proceedings, William T. Nugent could be dealt with in the same way."

Where the case is made out against a principal defendant, another defendant who holds merely as

the principal's agent or stakeholder will not be heard to defend the case on the merits. The question has come up more frequently in the case of appeals by a mere depositary or stakeholder. In a Maryland equity case the Court said:

> "A party who is a mere stakeholder liable for the payment of the money which he is ordered to bring into court for distribution, cannot be heard on appeal to object to the passage of the order which although passed unnecessarily or irregularly in no manner affects his rights."

Hall *v.* Jack, 32 Md., 253.

In a Pennsylvania equity case the Court said:

> "What has been said in Woodward's appeal disposes of this case if it is properly here. But the appellant has no interest in the controversy. He is a mere stakeholder, and to him it is a matter of indifference whether the money in his hands goes in discharge of the mortgage, or directly to the administrator of Mrs. Davis. The appeal is therefore dismissed."

Craig's Appeal, 38 Pa. St., 330.

Depositaries and stakeholders setting up no interest in themselves, are in equity treated as mere nominal parties and "garnishees" in a litigation between the principal parties where the assets so

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In the notes to this case in 12 Am. Decisions, 611, the principle which denied the right of the garnishee to make defense for the principal is stated broadly, as follows:

"If he (the principal debtor) were present to waive them, the garnishee will not be allowed to urge that to which the defendant has thought it best to acquiesce."

Citing:

[illegible]

notice, and thus forced the Government to make out the whole case against him.

His original answer claimed that the stock was deposited with him to indemnify him as well for fees as because he was under written contract to indemnify Leary under a contract of Dec. 14, 1899, the nature of which he did not further plead, and which his amended answer admits was cancelled February 20, 1900, but which when finally produced at this trial shows was no individual obligation of Kellogg.

He did not make in his first answer the defense of a trustee, but asserted an individual right.

He never amended his original answer which claimed that he was holding the stock as a deposit to indemnify himself, until after the taking of his deposition in New York, showing that he had already fully paid himself all fees claimed to be due him by Greene for services prior to the filing of the bill, and until after Leary brought suit against him in New York as his counsel admitted in judicio.

If the defendant Kellogg had originally filed an answer admitting his possession of the stock as holding for Greene and submitting to the judgment of the Court as a stockholder after Greene's default, or even if he had filed an interpleader bringing in Leary as a party, he might have had on application an allowance for costs and attorneys' fees.

23 Cyc. 33.

But every such bill in order to entitle the stakeholder to such costs and expenses, must state that the interpleading party "claims no interest in the subject matter himself" and "should show affirmatively that he stands in the position of a mere stakeholder and is wholly indifferent between defendants."

23 Cyc. 21.

> "Where the subject matter is money, or other property conveniently capable of manual delivery, the bill should contain an offer to bring it into court."

23 Cyc. 23.

Kellogg did not surrender the certificates of stock into Court until he was made to do so under the decree (Rec. p. 129-131).

Kellogg was not an express trustee, but merely a trustee *ex malificio* of trust funds fraudulently diverted by Greene, and holding as a mere depositary for Greene, and Kellogg was not a purchaser for value, aside from the question of notice to him of the frauds.

The decree in the Trial Court refused an allowance to Kellogg out of the fund, and provided

> "That the respective parties pay their own costs." (Rec. p. 131.)

Costs and allowances in the nature of costs are in the sound discretion of the trial court in equity

causes and no appeal lies from a judgment as to costs alone.

Paper Bag Machine Cases, 105 U. S., 766-772;
Wood *v.* Weimar, 104 U. S., 786;
Canter *v.* Ins. Co., 3 Pet. 307;
Elastic Fabrics Co. *v.* Smith, 100 U. S., 112.

In no aspect of the case did the amended answer of Kellogg stand in the way of the right of the United States to take the final decree without proofs after the decree *pro confesso* against Greene had been taken.

Nevertheless, the United States did make full proofs sufficient to entitle it to recover both against Greene and Kellogg as held by both courts below, as we have seen.

III.

The United States as against the intervenor Leary was entitled to the decree entered without proofs.

We have already referred to the facts disclosed in the record, showing that Greene never entered an appearance either to the original bill of the United States or to the bill of Intervention. In respect to the former, service was effected strictly in accordance with Section 8 of the Act of 1875, and decree *pro confesso* was duly taken more than

30 days prior to the final decree. In respect to the latter, no service was effected on Greene in the District, and no order was made under Section 8 of the Act of 1875 after the suit on the bill of Intervention was commenced by filing the same, or after the filing of the amended bill of Intervention, and no decree *pro confesso* was ever taken against Greene entitling the intervenor to proceed *ex parte* as to him.

We have pointed out that the order of April 17, 1908, made by Judge McDowell was simply a *rule nisi* affording Greene an opportunity to show cause against allowing Leary to commence suit by filing her bill of intervention, and was ample and sufficient for that purpose because it was discretionary with the Court to allow the filing of the intervention *ex parte*. But it was not an order made in conformity to Section 8 of the Act of 1875. It was not made on a "suit commenced" nor did it require the defendant "to appear, plead, answer or demur by a day certain" to the bill of Intervention.

In *Meyer* v. *Kuhn, et al.*, 65 F. R., 705 (C. C. A. 4th Circuit) a question of service by publication under a statute of West Virginia was involved. The defendant Kuhn set up in his answer certain facts and asked certain equitable relief in regard to the assets involved in the principal litigation against a co-defendant.

Mr. Justice Fuller delivering the opinion of the Court said:

"Assuming that the defendant Kuhn could, under these sections, have had the question of title as between himself and his codefendants, adjudicated upon an answer, nevertheless his proceeding in that regard would be subjected to the same tests as if he had sought affirmative relief by a cross bill. And it may be said, generally, that the appearance of a defendant to a cross bill, as between codefendants, should be enforced in the same manner as the appearance of a defendant to an original bill. Railroad Co. *v.* Bradleys, 10 Wall. 299; Smith *v.* Woolfolk, 115 U. S., 143, 5 Sup. Ct. 117; Beach Eq. Prac. §445; and see Conrad *v.* Buck, 21 W. Va., 396, 404. This answer of Kuhn was filed on May 26th, 1891, the bill having been previously taken as confessed against him, and no process was issued or order of publication taken thereon, nor any notice thereof given to his codefendants, nor any rule entered on them to plead thereto. The decree for partition was entered on the same 26th of May. On the 2nd of June thereafter, the report of the commissioners was confirmed, and a further decree made, which recited that Kuhn was the owner of that portion of the lands 'assigned to J. I. Kuhn or the heirs of Henry Meyers, deceased,' and then directed deeds to be made of the shares as partitioned by the commissioners. Under these circumstances, it might well be held that the decree so far as the title to the Meyer half was concerned, was of no binding force, and might be disregarded when drawn in ques-

tion in another case. Reynolds *v.* Stockton, 140 U. S., 254, 11 Sup. Ct. 773. But this result may be reached on other grounds, which appear to us decisive. Proceedings in partition or to quiet the title are not strictly proceedings in rem, for they are not taken directly against property, but they are regarded, so far as they affect property, as proceedings in *rem sub modo,* in respect of which, while there must be reasonable notice to the parties, personal service is not essential to jurisdiction, and constructive service may be substituted. Arndt *v.* Griggs, 134 U. S., 316, 10 Sup. Ct. 557. When, however, constructive service by publication is substituted by the statute in place of personal service a strict compliance with statutory provisions is exacted. Guaranty Trust & Safe Deposit Co. *v.* Greene Cove Springs & M. R. Co., 139 U. S., 137, 147."

In *Guaranty T. Co.* v. *Green Cove Springs & M. R. Co.,* 139 U. S., 137-147, the question came up on service of a bill of Intervention setting up independent liens in a suit in which the Court had jurisdiction of the *res* on the original bill. The service order on the Intervention bill was published for four lunar months instead of four calendar months. The Supreme Court holding the service absolutely void, and citing among other cases *Webster* v. *Reid,* 11 How., 437, said:

"In the last case it was held that where jurisdiction had been sought to be obtained

by publication as in this case, it was necessary to show that notice had been given by publication as the act required. 'If jurisdiction' says the court could be exercised under the act, it was essential to show that all its requisites had been substantially observed!' "

In *Bracken* v. *Union Pac. Ry. Co.*, 56 F. R., 447, 448 (C. C. A. 8th Circuit), Caldwell, J., for the Court said:

> "The mode provided by the act of Congress for acquiring jurisdiction over an absent defendant by publication is exclusive of any other mode, and to render such service effectual the requirements of the statute must be strictly pursued." * * *
>
> "The court by this proceeding acquired no jurisdiction in the case, and its judgment and all proceedings had thereunder, including the writ and return thereon, were nullities, and inadmissible in evidence for that reason."

In *U. S. v. American Lumber Co.*, 80 Fed., 311, Morrow, J., said:

> "The defendants being, confessedly non-residents, the proper, and, in fact, the only legal way, provided for by the laws of the United States, in which they could be served with process, and thereby effectually made parties to the suit brought against them in this District, was by obtaining the special order of service, sometimes termed the "warning order" required by Sec. 8 of Act of March 3, 1875 (18 Stat. 472). * * *

> "This process, however, although it was served on the defendants before the statute of limitations ceased to run, was ineffectual for any purpose, and was absolutely void. In the first place, a subpoena has no effect or validity outside of the territorial jurisdiction of the Court from which it emanates. This is in conformity to the cardinal principle of jurisprudence that the process of a court cannot extend beyond the territorial jurisdiction of the court, and that unless expressly authorized by law, its process cannot be served outside of the territory over which it has jurisdiction. (Citing many authorities.)"

The above is equally applicable to service out of the district of a *rule nisi* to show cause against filing of an Intervention.

EFFECT OF THE FAILURE TO MAKE GREENE A PARTY TO THE FORMER APPEAL.

If we admit (for the sake of the argument only) that service on Greene out of the District of the order to show cause of April 17, 1908, against leave to file the bill of Intervention, was service sufficient if leave to file had been granted on that, yet the order of July 20, 1908 (Rec. p. 65), denying leave to file, was final as to Greene on that proceeding. As we have already pointed out Greene was not made a party to that appeal. No notice was given him of it whatever. No decree *pro confesso* had been taken against him.

The right of Greene to object to the filing of the Intervention and of the United States to object were separate and distinct. The judgment refusing leave to file an intervention is not *res adjudicata,* and is not ordinarily appealable. It was appealable against the United States because the United States was about to obtain a decree disposing of the *res.*

Credits Com. Co. *v.* U. S., 177 U. S., 311.

It was only because Intervenor was not attempting to effect or disturb the denial order as against Greene, that she was allowed to prosecute her appeal without summons and severance. ~~That~~ appeal without making Greene a party to it, as matter of law, could not operate to suspend the effect of the judgment on the rule which called him to Court and revive the suit or proceeding terminated as against him five years before.

The most important reason for requiring joinder of all parties intended to be affected by an appeal is:

> "That the appellate tribunal shall not be required to decide a second or third time the same question on the same record."

Masterson *v.* Howard, 10 Wall., 416-418.

The reason would not exist if the determination of an appeal taken by one party to a judg-

ment, would operate to affect the interest of another party to it, not made a party to the appeal.

> "Cases arise beyond all doubt, where only one of several defendants is affected by the judgment or decree, and it is well settled that in such cases the party whose interest only is affected by the alleged error may carry up the case without joining the others in the appeal or writ of error."
>
> Simpson *v.* Greeley, 20 Wall., 152.
>
> "An appeal by one of several defendants brings up so much of the case and such of the parties as are necessary for the determination of his rights."
>
> Milner *v.* Meek, 95 U. S., 252.

The judgment of the Supreme Court on Leary's first appeal settled the question as against the United States of her right to file the Intervention. It did not revive the suit against Greene if it ever was commenced. But the denial of leave as it affected Greene's rights was not *res adjudicata*, and on filing the Intervention on mandate of the Supreme Court, it did not relieve the Intervenor from the necessity of serving Greene as on a new suit commenced. Intervenor did not attempt after the entry of the mandate either to serve Greene under Section 8 of the Act of 1875, or otherwise, although she thereafter amended her

intervention. Nor did she ever take a decree *pro confesso* against Greene or Kellogg on her Intervention.

THE EFFECT OF A FAILURE TO TAKE A DECREE PRO CONFESSO.

We have heretofore referred to the facts in the record showing that Intervenor took no decree *pro confesso* against Greene or Kellogg allowing her to proceed *ex parte* as to them. Greene never appeared, and Kellogg only appeared for the purpose of dismissing the averments of the amended Intervention, as it undertook to assert a liability *in personam* as to him, which motion was granted (Rec. pp. 78-79).

The right set up in the intervention to the *res* in controversy was under an alleged contract with Greene, in the nature of an equitable right as indemnity or security to an obligation of Greene to Leary. To a suit of that character Greene was an indispensable party. No judgment giving Leary any right in, of or to the *res* in question could be rendered in a suit setting up such alleged contract unless the Court obtained jurisdiction over Greene.

It was not enough that he was served as to the Government's claim and confessed as to that. He made no confession as to Leary's claim. We have already referred to the fact that Section 8 of the Act of 1875 provides that after service of the order as required on failure of the non-resident to ap-

pear at the time designated the cause is to proceed in the same manner as if service had been made; and to equity rules as to taking decrees *pro confesso,* and that the final decree cannot be lawfully taken on a bill in such case until 30 days after the decree *pro confesso.*

In *Cuebas* v. *Cuebas,* 223 U. S., 376, a bill was filed in the District Court of Porto Rico against several defendants, which Court had the same jurisdiction as the Circuit and District Courts of the United States. Plaintiff took a decree *pro confesso* against one of the defendants not appearing. Subsequently the Court held it did not have jurisdiction of the controversy because not all the defendants had the requisite diversity of citizenship from plaintiff. Thereupon the plaintiff amended the bill by striking out the name of all the defendants except the one against whom the decree *pro confesso* had been taken, and thus left a suit over which the Court did thereupon acquire jurisdiction as held by the Supreme Court. But the Supreme Court held that the decree *pro confesso* at the time it was taken was void, and that plaintiff was not entitled to a final decree without a decree *pro confesso* having been taken on the bill as amended.

The Court said (p. 390):

> "There is no claim that a final decree in pursuance of the allegations of the bill had

ever been directed and through inadvertence of either court or counsel omitted from entry. There was, therefore, no authority for a decree *nunc pro tunc* upon any known ground of equity procedure."

Mr. Daniel states the rule to be:

"After an order to take the bill *pro confesso* has been obtained, the bill cannot be amended, even to the extent of correcting a clerical error, without vitiating the proceedings, and rendering the order useless."

Daniel Chancery P. & Proc., star p. 522.

"And if a bill is materially amended where the defendant has failed to appear, a decree *pro confesso* taken on the same day, and *without serving new process,* is irregular and a sufficient ground for opening the decree founded thereon."

Harris *v.* Deitrich, 29 Mich., 366.

In the case at bar the Intervenor had no rights except such as she might assert against and through Greene, and she failed by want of service and by failure to take a decree *pro confesso* against Greene to put herself in a position to make any of the evidence offered by her admissible or competent to establish a claim against him, and she cannot otherwise show an interest in the *res.* Greene may have been entirely willing to confess judgment in favor of the United States on its bill, from

conscience or interest, and yet unwilling to confess the claim of Leary, and the Court cannot hold on an *ex parte* hearing she had a valid claim in these assets as against Greene.

In *Davis* v. *Mer. Trust Co.*, 152 U. S., 590, an intervenor appealed from a decree of foreclosure without making the mortgagor, against whom a decree *pro confesso* on the original bill had been rendered, a party to the appeal. In dismissing the appeal the Court said:

> "The mortgagor may be unwilling that the decree should be set aside notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary in any given case to determine that his interests would or would not be promoted by the setting aside of the decree; it is enough that in that matter he has a direct interest, and because of his interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defense."

We insist that the case at the trial stood on the merits precisely as if the Intervenor had never attempted to make Greene a party to the Intervention, and was attempting to set up alleged rights as to Greene against third persons, and Intervenor has no standing in Court to prevent the complainants from having a final decree on the bill against

Greene, taken as confessed by Greene, and against Kellogg whose pleadings made him a mere depositary for Greene without interest.

Standing on the record of the Intervention as it was, it was proper on that account for the Trial Court to have denied all relief on it against the *res* and against the other parties to the suit, and for this Court to affirm that judgment.

Cuebas *v.* Cuebas, 223 U. S., 376-390.

IV.

The Government fully made out its case on the proofs, entitling it to the decree entered not only against Greene but against Kellogg and Leary.

A.

The Testimony and Evidence.

Whatever rights Leary acquired, if any, in any securities of Greene's by reason of any contract of indemnity for becoming bail on bonds which had become exonerated prior to the execution of the bond of January 20, 1902, did not place Leary under any obligation to become surety on the latter. If he acquired any right, express or implied, to indemnity in securities claimed through Greene, it was a right acquired *as of that date* when he became surety on the bond and as a result of so

becoming such bail. If he acquired such right it was in privity to Greene's title as of that date. It is not claimed by Intervenor that Leary acquired legal title to any securities, but an equitable title. But whatever be the nature of the right, if any he acquired, he acquired it for signing and execution of a bail bond, which recites the criminal proceedings against Greene for the very conspiracy and frauds set out in complainant's bill, and refers to the taking of the very evidence before the Commissioner in the removal proceedings which was admitted in evidence in this case, and that the Commissioner had found probable cause of Greene's guilt and that this finding had been affirmed by the reviewing and appellate courts.

The stipulation of all parties to this appeal admits that the evidence so taken in the removal proceeding, fully makes out the conspiracy and frauds charged in the bill, and that the share of the fraudulent profits of the Government contracts received by Greene was $722,528.03 running through a series of divisions made between the conspirators from January 3, 1893 to July 6, 1897, as set out in Exhibit E to the bill. The evidence on the removal proceeding is before the Court, but we take it that the admission by stipulation that it does show the above will be taken as conclusive on the appellees. Judge Brown in his ruling on the issue of the warrant of removal to which the bail bond of January 20, 1902, refers, had said relative to the identical evidence:

> "It (the Government) has shown beyond question that Captain Carter, the employee of the Government and the engineer in immediate charge of the work on the Government's behalf had for several years immediately preceding the contracts referred to in the indictment received from the contractors continuously through his father-in-law in many divisions of profits one-third of the final net proceeds of each contract remaining for division among the chief contractors and that this one-third amounted in the aggregate to over $700,000."
>
> U. S. *v.* Greene, et al., 108 F. R., 816-820.

Leary was on actual notice of all that the bail bond recited and on constructive notice of all that the evidence referred to in the bail bond showed, and which a prudent person would have discovered therefrom when dealing with one so charged with crime and held to be probably guilty thereof. The testimony of R. F. Westcott in the identical removal evidence was offered and received in the civil suit against O. M. Carter, et al., to charge notice to Carter's brother and uncle, of Carter's fraudulent title to certain securities shown in the removal record to have been purchased with Carter's share of the frauds, where it was shown the brother and uncle had general notice of the proceedings and had on one day attended the hearing, and where they undertook to set up a claim to the said securities as *bona fide* purchas-

ers without notice. The Supreme Court held that it was admissible against them for the purpose of charging notice to them even though neither they nor Carter were parties to the removal proceedings.

U. S. *v.* Carter, 217 U. S., 286-323.

The testimony in the removal proceedings was admissible for all purposes in the present suit against Greene and all persons claiming in privity to him, irrespective of the stipulations in the record.

(a) In the first place, decree *pro confesso* having been taken against Greene, complainants were entitled to proceed *ex parte* as to him, and the removal evidence was duly certified and proved by affidavit to have been taken under oath. This made it admissible against Greene, and against Kellogg whose pleading shows that he was a mere depositary for Greene, and it was admissible against Leary at least to show notice to him, and to throw the burden upon him to prove that he was a *bona fide* purchaser for value without notice.

(b) It was also admissible against Greene, Kellogg and Leary, because the evidence was taken in a proceeding in which the issue of conspiracy and fraud on the part of Greene was substantially the same as made by the bill in this cause.

"Depositions taken in another suit between the same parties upon the same subject-matter of controversy are admissible as a substitute for viva voce testimony of the witness in the suit in which they are offered and this rule applies if the parties to the former suit were privies of the present one."

9 A. & E. Enc. Law, 2nd Ed. 357 and cases cited.

16 Cyc. 1094, and cases cited.

Nor does it make any difference that the proceeding in which the evidence was taken was criminal, and the proceeding in which it is offered be civil, although the rule would not apply the other way.

"The testimony of a witness, since deceased, given before the magistrate on a commitment trial for an assault with intent to murder, may be used against the defendant in a civil suit for damages by the person injured."

Gavan *v.* Ellsworth, 45 Ga., 283.

Charlesworth *v.* Tinker, 18 Wisc., 633.

(c) It was also admissible by reason of the stipulation entered into between the United States and Kellogg on December 21, 1905, and the filing of the same with the removal record on January 1, 1906, in said cause (Rec. p. 125), and by virtue of the terms imposed upon the Intervenor by the Su-

preme Court, and order entering mandate of May 20, 1913 (Rec. 67-68).

R. F. Westcott's Testimony.

The "Third" assignment of error made by Intervenor (Rec. p. 133) is on the admission in evidence over objection of the testimony of R. F. Westcott taken in the removal proceedings. Westcott was dead at the time this testimony was offered (Rec. p. 126). The Court received that evidence saying "it would give only such effect to the testimony as it considered proper."

The evidence which had been taken under oath was certainly admissible on the part of the Government to make out its case against Greene, against whom decree *pro confesso* had been entered, irrespective of whether it would be admissible as against Leary as proof of the substantive facts sworn to by Westcott or not.

As against Kellogg it was admissible because he merely holds for Greene and he as attorney for Greene personally cross-examined Westcott when he delivered that testimony.

It was admissible both against Kellogg and Leary if not to prove the substantive facts for the purpose of charging them with notice of what he testified to, under the authority of the Supreme Court already cited. The only part of the case to which Westcott's testimony relates is in regard to the proof of the conspiracy between Greene

and Carter and division of the money between them shown by Exhibit E. His testimony was merely cumulative, and in the stipulation for this appeal (Rec. p. 6, par. [9]) it is expressly admitted by the Intervenor and Kellogg that the testimony in the removal proceedings "even independently of the testimony of R. F. Westcott" fully establish the conspiracy and frauds charged against Greene in the bill and that Greene's share of the fraudulent profits were $722,528.03, as shown in Exhibit E to the bill.

The admission or exclusion of R. F. Westcott's testimony would therefore be of no consequence, since the ultimate facts to which it relates are all admitted by appellees, and in any event it was admissible against them on the question of notice.

> "These errors are not available in a case in equity, for the chancellor is supposed only to act on proper evidence. There is no question of law involved, only questions of fact; and if the proper evidence justifies the decree, the judgment ought to be affirmed, and we think it does."
>
> Mammoth Min. Co. *v.* Salt Lake Machine Co., 151 U. S., 447-451.
> Ruckman *v.* Cory, 129 U. S., 387-390.

Where the fact for which evidence is offered is afterwards admitted by the party assigning error, it is not necessary to inquire whether the testimony was properly received in evidence.

> Chubb *v.* Upton, 95 U. S., 665.

The Tracing of the Norfolk & Western Stock, as an Investment of Greene's Share of the Illegal Profits of the Contracts.

We have already pointed out that both the District Court and Circuit Court of Appeals have found the evidence fully establishes that the Norfolk & Western stock was purchased with a part of the funds fraudulently diverted by Greene. And that under the rule established, that fact makes it unnecessary for this Court to examine into the details of the tracing. As a matter of safety, however, we will here make the references necessary if the Court should think proper to make that examination.

In Exhibit 716 to this proceeding Mr. Johnson, the expert accountant, has made an analytical tracing by references to the accounts in evidence, of all the securities into which Greene's investments of the diverted trust funds were made, in any way affecting the present case. That was done because in the first instance it was sought to make Kellogg account for all such securities or proceeds traced to him. Those tracings show that *all* the funds of Greene which went into his account with Lee Livingston & Co. were traced from some one or all of the thirty-two "Divisions" of the trust funds divided between the conspirators.

The case as now insisted on by the Government and as limited by the decree eliminates an accounting from Kellogg for everything save the

Norfolk & Western stock, and proceeds and dividends thereof since the filing of the bill. Under the rules applicable to tracing trust funds through an account, the Norfolk & Western stock can be traced with certainty from the trust funds of the Government diverted through what Mr. Johnson's Exhibit 319 in the removal proceedings and Exhibit 716 in this proceeding calls divisions 10, 11, 18 and 32, in which the deposits of Carter's official disbursing checks to the contracts at those respective times are set out, and the divisions of the proceeds shown by reference to the original accounts and documents in evidence in the removal proceedings.

Lists of all the disbursing checks issued to the contractors per Carter's official check-stub book entries on vouchers and list of vouchers and for each jetty contract from 1892 to 1897 inclusive appears as blue-print Exhibits 167 to 173 identified printed Removal record, Vol. 1, pp. 437-438.

Lists of the original of all these disbursing checks, with the endorsements thereon showing the banks in which they were deposited, etc., appears as blue-print Exhibits 197, 198, identified printed Removal record, Vol. 1, pp. 555-556, and Exhibits 225, 226, 227, identified printed Removal record, Vol. 1, pp. 634-635, and Exhibit 285 identified printed Removal record, Vol. 1, p. 943.

An Index to all the Exhibits in the Removal proceedings, with references to the page of the printed removal or "Shields" record where the same were

identified and offered, is in the record of this appeal.

In view of the admissions made on this appeal of what the removal record shows, and the short cut we propose to take on the tracings from the Divisions designated Divisions 10, 11, 18 and 32, and the fact that the original disbursing checks for these four divisions have been sent up on appeal for inspection, will make the use of that Index probably unnecessary.

We can make the tracings of the trust funds from the disbursing checks into these investments by reference to the primary Exhibits in evidence, without reference to Mr. Johnson's analysis Exhibit 319 of the removal record or to his analysis of further tracings in Exhibit 716 of this proceeding, and in that way make a short cut to the Norfolk & Western stock in controversy, as follows:

In general, it may be stated that Carter's official disbursing checks to the contractors, which were used for division of profits between them, were deposited in certain banks in New York City, to the credit of accounts kept in the name of John F. Gaynor, B. D. Greene and W. T. Gaynor, each of whom was shown in the removal proceedings to be a party to the conspiracy. W. T. Gaynor was shown to be merely a salaried employee of the contractors, and the account kept in his name in the American Exchange National Bank of New York City, was merely used as a blind account

to cover up the fact that a third of the profits were by checks cashed on some one or other of the three bank accounts into which the disbursing checks were deposited, and went to Oberlin M. Carter.

When a division was to be made between the three principal conspirators of the amount represented by the official disbursing checks to be divided, those special disbursing checks would for that division be deposited, say in the account of J. F. Gaynor in the American Exchange National Bank. J. F. Gaynor would then immediately or shortly thereafter issue his check for a third of the deposit to B. D. Greene, representing the latter's share, which check would be deposited in Greene's account in the American Exchange National Bank of New York or in the Knickerbocker Trust Co. of New York. J. F. Gaynor would then cash a check on his said account for one-third of the deposit, and an amount of cash just equal to Gaynor's cash withdrawal would be found deposited in Carter's bank account with the Union Trust Co. of New York. That would leave one-third of the deposit in J. F. Gaynor's account for his share.

When another division was to be made, Carter's official disbursing checks would be deposited, say in B. D. Greene's account in the American Exchange National Bank or Knickerbocker Trust Co. B. D. Greene would then issue his check on that account to J. F. Gaynor for a third, he would cash a check for a third for Carter, leaving a third in his own account for his use.

When still another division was to be made, Carter's official disbursing checks would be deposited in the W. T. Gaynor account in the American Exchange National Bank, and a third would be checked out to B. D. Greene, a check for a third cashed for Carter, and the other third left therein for John F. Gaynor, the evidence being that the Bank was instructed to treat checks drawn on either of the accounts kept in the name of John F. Gaynor and W. T. Gaynor, as payable out of either.

A.

DIVISIONS 10 AND 11 OF EXHIBIT 716.

Sept. 1, 1893	Carter's disbursing check No. 224461 deposited in American Ex. N. Bk., N. Y., on Sept. 6/93 to credit of account of W. T. Gaynor, per removal Ex. 246.....	$77,975.00
Oct. 11/93	Check W. T. Gaynor on American Ex. N. Bk., N. Y., to Greene, Removal Ex. 248.....	37,000.00
Oct. 11/93	Check deposited to Greene's credit with Lee Livingston & Co., brokers, Ex. 248 and 701	37,000.00
Oct. 11/93	Purchased for a/c of Greene in his account by Lee Livingston & Co., 600 shares of Del., Lack. & West. stock Nos. 115,663, 116,162, 116,163, 116,181, 116,180 and 115,585 as per said account Ex. 701 ..	45,862,50

No. 10/93 Exhibit 706, affidavit of Transfer Clerk Del., Lack. & W. Co. showing surrender Nov. 10/93 of the above certificates and reissue therefore of 600 shares of same stock per certificates 116,508 to 116,513 for 100 shares each.

June 11/95 Also showing surrender June 11, 1895, of the last above certificates and the reissue therefor of 600 shares of said stock in certificates in name of B. D. Greene, Nos. 117,840 to 117,845. (The further tracing of 200 of the above shares represented by certificates 117,840, and 117,844, will be taken up presently under heading B.)

B.

Division 18.

Sept. 10/94 Deposited in Amer. Ex. N. Bank, N. Y., to credit of B. D. Greene, per acct. Removal Ex. 240, Carter's disbursing checks Sept. 8/94 No. 269,252..... 5,000.00
269,256..... 55,683.74
269,25..... 100,000.00

$160,683.74

Checks of B. D. Greene on Amer. Ex. N. Bank, deposited to credit of his acct. with Lee Livingston & Co., per Ex. 701 and Ex. 330 J.J.:
Sept. 11, 1894..... 10,000.00
Sept. 12, 1894..... 90,161.75

Purchased in account of B. D. Greene with Lee Livingston & Co., per Ex. 701, Sept. 12, 1894—400 shares of Del., Lack. & West. stock certificates Nos. 117,174 and 117,177. Delivered to Greene Sept. 18, 1894..... 33,925.00

Sept. 29/97 per Ex. 701 Greene redelivered 400 shares of Del., Lack. & W. stock per certificates Nos. 117,174, 117,175 (200 shares of above) and 117,840, 117,844 (200 shares of those referred to under A, June 11, 1895.

Oct. 4/99 These were changed per Exhibit 701, Oct. 4/99 into 400 Del., Lack. & W. shares, per certificates 119,966, 119,967 and 119,928 and 119,929, and redelivered by Lee Livingston & Co. to B. D. Greene.

March 22, 1900—400 shares of Del., Lack. & West., represented by certificates Nos. 119,928, 119,929 and 119,-966, 119,967 in the name of B. D. Greene were delivered by L. L. Kellogg to A. W. Kilbourne & Co., brokers, per Exhibit 707.

March 23, 1900 The above 400 shares were changed into 400 shares represented by certificates 112,324 to 112,-327 per a/c Kellogg with A. W. Kilbourne & Co. 707 Ex.

March 23, 1900—The above 400 shares of Del., Lack. & West. represented by certificates 112,324 to 112,327, were sold by A. W. Kilbourne & Co. for a/c of Kellogg per Exhibit 707 for.. 35,791.50

(It will thus be seen that the 400 shares of Del., Lack. & Western stock, 300 shares of which Leary's intervention claims was put in Kellogg's hands Dec. 14, 1899, consisted of 200 shares, purchased by Greene with part of the moneys directly traced from Carter's disbursing check in divisions 10, 11 and 200 shares purchased by Greene with part of the moneys directly traced from Carter's disbursing checks in division 18.)

(The further tracing of the $35,791.50 proceeds of these 400 shares of Del., Lack. & Western stock will be made presently.)

C.

DIVISION 32.

July 6, 1897 Deposited to credit of B. D. Greene in the Knickerbocker Trust Co. of N. Y., per removal Exhibits 236, 235, 235D and 235C, Carter's disbursing checks:

July 6, 1897, No. 270,536	$230,749.70
270,537	345,000.00
	$575,749.70

(Johnson's analysis of the accounts in the Removal Exhibit 319 shows that Greene's share of above was $126,691.00.)

July 27, 1897 Check B. D. Greene on Knickerbocker Trust Co. (original check in evidence Ex. 708) deposited per Exhibit 701 to credit of B. D. Greene with Lee Livingston & Co. . . . $125,000.00

Exhibit 701 shows that following the deposit of July 27, 1897, in Greene's account with Lee Livingston & Co. of the $125,000 check, that there was purchased for Greene's account therein quite a large amount of stocks of various sorts, which the brokers held as security for the whole account. Some of these were subsequently sold, and the proceeds re-invested, and only certain of the securities so bought, not sold were finally delivered up to Greene.

Among others:

Purchased Aug. 6, 1897, 500 shares Canada Southern cost	27,200.00
Sold Sept. 21, 1897, same shares, proceeds credited in the account for....	30,137.50
Purchased per Exhibit 701:	
Sept. 24, 1897 500 shares Canada Southern stock certificates numbered when bought 22,578, 22,910, 22,913, cost	29,937.50
Nov. 3 200 shares Canada Southern stock certificates, when bought numbered 23,245, 23,246, cost	10,420.55

The above certificates for 700 shares Canadian Southern purchased were held by the brokers and finally changed into certificate for 700 shares numbered 23,242 to 23,947 and delivered to Greene Oct. 4, 1899, per Exhibit 701.

March 22, 1900, the 700 shares Canadian Southern numbered 23,242, 23,244 to 23,248, 23,947, were delivered by L. L. Kellogg to A. W. Kilbourne & Co., brokers, and by them transferred into 700 shares numbered 24,868 to 24,874, per Kellogg's acct. with Kilbourne & Co., Ex. 707.

March 23, 1900, per Exhibit 707, A. W. Kilbourne & Co. sold for acct. of L. L. Kellogg, 600 shares Canadian Southern, Nos. 24,868 to 24,875 for..... 29,825.00

March 26, 1900 Sold by same for acct. of L. L. Kellogg:

100 shares of Canadian Southern No. 24,874 for 4,975.00

April 6, 1900 A. W. Kilbourne collected coupons from So. Ry. bonds of Greene's for Kellogg, per Exhibit 707 300.00

D.

Under head "B" above we have shown the sale by Kilbourne & Co. for Kellogg, March 23, 1900, of the 400 shares Del., Lack. & West. stock traced, for. 35,791.50

Under head of "C" above we have shown the sale by Kilbourne & Co. for Kellogg:

March 23, 1900, of the 600 shares of Canadian Southern, traced, for aggregate of 29,825.00

March 23, 1900 Exhibit 707 shows that there was purchased in acct. Kellogg with A. W. Kilbourne & Co.,

1,000 shares Canadian Southern, certificate numbers 24,870-24,476-24,-478-24,384-24,434-24,591-24,655-24,701-24,304-24,383.

Transferred into numbers 25,063 to 25,-071 and delivered to Kellogg, June 26, 1900, cost 51,775.00

(Presumptively the $35,791.50 proceeds of the Del., Lack. & Western stock which was first sold went into part purchase of the above Canadian Southern, and the balance of the $51,776.00 was from the $29,825.00 proceeds of the Canadian Southern sold March 23, 1900.)

March 26, 1900, per Exhibit 707, there was sold (see "C" above) by A. W. Kilbourne & Co., 100 shares of Canadian Southern, No. 24,874 (Part of the 700 lot) for $4,975.00

This left $18,816.50 credit to account of Kellogg from the traced securities March 26/1900.

E.

NORFOLK & WESTERN STOCK.

March 26, 1900 Purchased by A. W. Kilbourne & Co. for a/c of Kellogg Exh. 707, 500 shares of Norfolk & Western stock as follows:

100	shares	per	certificate	2368
100	"	"	"	2369
100	"	"	"	2370
100	"	"	"	298
10	"	"	"	10427
25	"	"	"	9557
3	"	"	"	10225
62	"	"	"	5885

Cost $18,750.00

Delivered to Kellogg March 27, 1900.

July 9, 1901 Exhibit 707 shows redelivery of above 500 shares by L. L. Kellogg to A. W. Kilbourne & Co. by the same certificate numbers, as above.

July 17th, 1901 Exhibit 707 shows 490 above shares returned to Kellogg with certificates changed as follows, and in lieu of the above:

400 shares in certificate 5895 to 5898

90 shares in certificate 11077

Nov. 6, 1901 Returned to Kellogg per Exhibit 707, 10 shares in certificate 74,200

(Certificates 5896 to 5,897-5, 898-11,077 and 74,200 are the shares in controversy now admitted to still be standing in the name of L. L. Kellogg.)

The first stipulation of December 21, 1905, paragraph 13, admits that Kellogg still holds the certi-

ficates for the above 400 shares of the Norfolk & Western stock, and that he sold the other 100 shares through Nevins for Greene Sept. 10th, 1903.

CONCLUSIONS AS TO TRACINGS.

(1) It appears from the documentary evidence in proof that the 400 shares of Norfolk & Western stock in controversy are traced as an investment with proceeds of Greene's share of the illegal profits of the contract, and which share of Greene was traced to deposits in his bank accounts proved in the removal proceedings.

(2) That this money is traced from the bank accounts of Greene by checks for large amounts into an account of Greene's with Lee Livingston & Co. and there used to purchase securities.

(3) That this Lee Livingston & Co. account of Greene's as well as the 1st stipulation of December 21, 1905, admits that large amounts of money from Lee Livingston & Co. were checked out therefrom to L. L. Kellogg after the removal hearing, which put Kellogg on full notice of the existence of that account, also that a large amount of the securities so bought by Greene in that account by Greene were turned over to Kellogg, his attorney, while the removal proceedings were in progress, and changed into certificates in the name of Kellogg on March 22nd, 1900, after the commissioner had made his first finding of probable cause of Greene's guilt. That the certificates were surrendered and reissued several times but kept in the name of Kellogg

until sold, or delivered to Greene, the Norfolk & Western being still in his name.

(4) That at the time of the sale of the Del., Lack. & Western stock March 23rd, 1900, the temporary bail bond for appearance of Greene before the commissioner was *functus officio* and exonerated. That the presumption is that the 400 shares of Norfolk & Western stock purchased March 26, 1900, was not purchased with the proceeds of the Del., Lack. & Western stock referred to in Leary's intervention, but from the proceeds of Canada Southern, but it makes no difference in result so far as the Government's tracing is concerned, since the Canadian Southern and Del., Lack. & Western stocks were all purchased with the trust funds belonging to the Government.

(5) That if Kellogg and Leary had no actual notice that these stocks were purchased with part of the $722,000, shown in the removal proceedings to have been fraudulently diverted by Greene, they were put on inquiry and constructive notice of that fact.

DEFECT IN LEARY'S ALLEGED TRACING.

(6) The fact that the Norfolk & Western stock was not bought with the proceeds of the Delaware & Lackawanna stock, has an important bearing, however, on Leary's attempt to claim the latter

as a substitute for the former. The amended Intervention charges that Greene withdrew the Del., Lack. & Western stock and deposited with Kellogg the 400 shares of Norfolk & Western stock, to be held on the same terms. No averment is made as to when this alleged substitution was made. If made, it could not have been made prior to March 26, 1900, when the evidence shows that the Norfolk & Western was purchased and that was subsequent to February 20, 1900, when the temporary bail bond, to which alone the Del., Lack. & Western stock was to apply as indemnity had been exonerated. No proof is offered by Leary that there was ever any agreement by Greene that such substitution should be made. But Intervenors rely upon the Government's evidence, to show that the Norfolk & Western stock was purchased with the proceeds of the Lackawanna stocks. That proof, however, (see "D" above) indicates presumptively that the proceeds of the Lackawanna & Western stocks was used by Kellogg to make a different investment, to wit, in part payment of the purchase price of 1000 shares of Canadian Southern bought March 23, 1900, and no part of which was used in purchasing the Norfolk & Western stock which was purchased March 26, 1900. The answer of the Government to the Intervention denied that there was such substitution or that the Norfolk & Western had been purchased with the proceeds of the Lackawanna & Western (Rec. p. 82). The amended answer of Kellogg to the original bill (Rec. p. 98)

states that the Lackawanna & Western stocks were sold by him on March 23, 1900, and the proceeds taken from Kellogg by Greene, and that the Norfolk & Western stocks were purchased with the proceeds of other stocks sold at or about that time.

Certainly the evidence is insufficient to show that there was any substitution of the Norfolk & Western stock under any agreement for holding the same on like terms to those applicable to the bail bond of December 14, 1899, which had been exonerated before the purchase of the Norfolk & Western stocks.

THE LAW AS TO TRACING TRUST FUNDS.

Mr. Pomeroy says:

> "Trusts *ex Maleficio*. In general whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have any legal estate therein, and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer, or in the hands of any

subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust.

The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit.

The principle is applied wherever it is necessary for the obtaining of complete justice, *although the law* may *also* give the remedy of damages against the wrongdoer."

2 Pomeroy's Eq. Jr., 2nd Ed., Sec. 1053.

See also—

Idem, Sec. 1051.

For many wrongs the plaintiff may have an election to so treat the transaction that his remedy may be at law or in equity according to the election of plaintiff.

This election belongs to the person wronged, not the wrong doer.

One who has wrongfully converted the property of another into other property, cannot be heard to contend that the true owner cannot recover the property so acquired by the wrong doer in the exchange, but must be content with a suit for damages if the wrong doer is solvent.

These various elections which the injured party may exercise, and the effect such election has on the remedy are well stated by Justice Swayne, in a case in which a bill in equity was sustained

by the Supreme Court, after it had been dismissed by the lower court, and the Supreme Court sustained the right to recover assets in the jurisdiction and decreed an accounting in equity and gave in equity a money judgment for such part of the property as had been converted and which could not be reached in the jurisdiction.

May *v.* Le Claire, 11 Wall., 217.

"Where money has been misappropriated, the general rule of equity is, that those wronged may pursue it as far as it can be traced, and may elect to take the property in which it has been invested or to recover the money."

Smith *v.* Vodges, 92 U. S., 186.

"A court of equity has jurisdiction to reach property (fraudulently acquired) either in the hands of a wrongdoer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust."

Moore *v.* Crawford, 130 U. S., 122.

"As long as trust property can be traced and followed into other property into which it has been converted remains subject to the trust; that if a man mixes trust funds with his own the whole will be treated as trust property, except so far as he may be able to distinguish what is his own."

Nat. Bank *v.* Insurance Co., 104 U. S., 54.

"When a trustee mingles trust money with his own, the *right* and *lien* of the beneficiary attach to this entire combined fund, as security for all that actually belongs to the trust estate."

2 Pomeroy's Eq., Sec. 1076, p. 1598.

"If he (the trustee) purchases land partly with his own money and partly with the trust money, the *cestui que trust* has clearly a *lien on the whole* estate for the amount of his fund."

Eaton on Eq., Sec. 210, p. 439.

"Where a trustee has abused his trust in the same manner, the *cestui que trust* has the *option* to take the original or the substituted property; and if either has passed into the hands of a *bona fide* purchaser without notice, then its value in money."

May *v.* Le Claire, 11 Wall., 236.

"An application of the same principle which entitles the beneficial owner of a trust fund to claim all profits which the fiduciary has made by the use thereof, gives him the option, when the fiduciary has made an improper investment, of either adopting, and accepting such investment, if he should d em it for his interest to do so, or rejecting it and charging the fiduciary with the amount misapplied."

17 A. & E. Ency. Law, p. 475.
Oliver *v.* Piatt, 3 How., 333.

These principles apply as well where a trustee or bailee exchanges with himself the trust fund for other property or money of his own, as where the exchange is made with another person. The trust will attach to the property taken in exchange in either case.

Thus Church, Chief Justice, said in the case of *Van Allen* v. *Amer. Nat. Bk.*, 52 N. Y., 1-5:

> "Nor is it effected by the fact that the agent instead of depositing the identical moneys received by him on account of his principal, substituted other moneys therefor."

He illustrates the proposition thus:

> "A having $100, the proceeds of a sale of property of B, intends to place it in a depository and keep it for B, and instead of putting the identical bank bills in the designated place, substitutes others of the same amount and keeps them for B. As such proceeds, can there be any doubt that the $100 thus substituted would occupy the same position as the particular bills obtained for the property, and that they would be impressed with the same trust."

Cited and approved in:

Nat. Bk. *vs.* Ins. Co., 104 U. S., 70.

It was held in *Knatchbull* vs. *Hallett*, 13 Ch. D., 696, that where a fiduciary has mixed a trust fund with his own in his bank account, and drawn out and dissipated a part of it, the rule attributing the first drawings out to the first payments into the account does not apply, there will be a conclusive presumption that he dissipated his own fund and the balance not dissipated will be held to be the trust fund.

Approved in:

Nat. Bk. *vs.* Ins. Co., 104 U. S., 68.

"It is contended that the doctrine of this case does not apply, because the note and mortgage were not purchased with the proceeds of the bonds taken, but were substituted for them. We do not think this fact takes the present case from the principle upon which the other proceeds, that property acquired by a wrongful appropriation of other property covered by a trust is itself subject to the same trust. It cannot alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it."

Cook v. *Tullis*, 18 Wall., 332-342.

"Neither the right of the broker to repledge stock carried on margin for a customer, nor his right to sell such stock for his protection when the margin is exhausted, alters the re-

lation of the parties, is inconsistent with the customer's ownership, or converts the broker into the owner of the stock.

"A certificate of stock is not property itself but evidence of the property in the shares, and, as one share of stock is not different in kind or quality from every other share of the same issue and company, the return of a different certificate, or the right to substitute one certificate for another of the same number of shares, is not a material change in the property held by the broker for his customer."

Richardson, Trustee, *v.* Shaw, 209 U. S., star pp. 365, 366.
Sexton *v.* Kessler, 225 U. S., 90-98.

The foregoing authorities are sufficient, not only to show the equity jurisdiction over a bill to follow a trust fund, but the underlying principles controlling the rights of the parties.

V.

Defendant Kellogg made out no case on the evidence, and he was on full notice of the frauds.

We have already pointed out that the amended answer of Kellogg did not set up rights in or to the Norfolk & Western stock other than as holding the same as a depositary for Greene; that he did not set up that any fees or expenses were due him, nor did it set up any right to hold the same for

Leary, or any contract with Greene in that respect, and the record shows that all his claims against Greene had been paid off just prior to the filing of the bill, and he offered no proof that anything was due him or his firm.

The stipulation of December 21, 1905, (Rec. pp. 121-125) shows that Kellogg was paid by Greene out of the funds in Kellogg's hands the following fees and disbursements of his and his firm's office:

July 27, 1900, Item	5th.....	$3,443.75
October 16, 1900, "	6th.....	300.00
November 1, 1900 "	7th.....	1,983.78
April 9th, 1901, "	8th.....	400.00
July 16, 1901, "	10th.....	485.10
October 8, 1901, "	11th.....	9.90
October, 1901, "	14th.....	640.06
		$7,762.59

Kellogg's amended answer did, however, deny the existence of the frauds charged against Greene and denied any notice thereof to him existing when he received the securities in controversy.

Now, so far as the Government's right to recover the Norfolk & Western stock from Kellogg holding them merely as a depositary for Greene, is concerned, it is utterly immaterial whether Kellogg was on notice at the time he received the stocks of Greene's frauds or the rights of the Government therein, or not.

> "A party who wrongfully obtains the legal title to lands which belongs rightfully to an-

> other whether he acts in good faith or not, will be held a trustee for the equitable owner."

Lakin *v.* Mining Co., 25 Fed., 337.

In no sense was he a purchaser for value entitled to set up rights against the true owner under the authorities as to following trust funds hereinbefore cited. By stipulation with the Government Kellogg was allowed to put in his own affidavit as evidence taken under examination and cross examination (Rec. p. 116), the general purport of which was a denial that he had notice of Greene's guilt of the frauds charged in the bill and in the removal case, and the assertion that he still believed Greene innocent.

The agreement to admit that affidavit in evidence (Rec. p. 116) was coupled with the reservation that

> "the Government reserving and making objection to the admissibility of said proposed testimony that it is irrelevant, immaterial and incompetent, *and not being understood as admitting the facts alleged in said affidavit.*"

The affidavit states that the removal proceedings were conducted on the part of Greene by Abram J. Rose, law partner of Kellogg, and that Kellogg took no part therein, *except on one occasion, on or about August* 10, 1900.

The removal record shows that Kellogg took a personal part in the removal proceedings. His

personal appearance was entered as attorney for defendants on the very first day of the hearing, Dec. 30, 1899 (Vol. 1, p. 74) and his personal participation all through the proceedings. He personally conducted the cross examination of R. F. Westcott on the following dates as shown by that record:

September 27, 1900, p. 1036 to p. 1111;
September 28, 1900, p. 1112 to p. 1170;
October 1, 1900, p. 1171 to p. 1230;
October 2, 1900, p. 1131 to p. 1266;
October 3, 1900, p. 1267 to p. 1324;
October 4, 1900, p. 1325 to p. 1339;
October 5, 1900, p. 1340 to p. 1414;

That cross examination covered almost every feature of the case involved in the conspiracy charge and division of the money between the conspirators. Now whatever Kellogg may say in his affidavit about believing in Greene's innocence he has stipulated (Rec. p. 6) that the evidence taken in the removal proceedings fully establishes Greene's guilt of the conspiracy charged, and of the division of the fraudulent profits as shown on Exhibit E to the bill, and that Greene's share of those profits was $722,528.03.

In view of these facts appearing upon the face of the record, how was it possible for the Circuit Court of Appeals to say in its opinion (Rec. p. 145) that this affidavit of Kellogg was in nowise contradicted, and that the Government's conten-

tion of Kellogg's knowledge was not sustained, unless we understand that the Court was confining itself to the state of facts existing on December 14, 1899, when Kellogg first received the securities (Rec. p. 146)? The only pertinent inquiry was as to Kellogg and Leary's knowledge January 20, 1902.

Where a firm claim to have acquired even a negotiable instrument as *bona fide* purchasers for value without notice, and fraud in the antecedent holder was shown, the Supreme Court of Maryland held that the testimony of one member of the firm was not sufficient to overcome the burden of proof, that the other members should have been called to show that they had not been put on notice.

McCasher *v.* Banks, 84 Md., 292.

When the party, who is true equitable owner even of negotiable security, has, by proof, besmirched the title of the holder, by showing that an antecedent holder had acquired by fraud on the true owners, then that the burden of proof is shifted to the present holder to show that he or some one under whom he claims acquired title as a *bona fide* purchaser for value without notice is now too well settled to admit of serious debate.

Balfour *v.* Hopkins, C. C. A., 93 F. R., 570;
Balfour *v.* Parkinson, 84 F. R., 337;
Lakin *v.* Mining Co., 25 F. R., 337;

Failey *v.* Bateman, 40 W. Va., 542;
Whelan *v.* McCreary, 64 Ala., 319;
Brush *v.* Ware, 15 Pet., 40;
Banks *v.* McCasher, 82 Md., 518;
4 A. & E. Enc. Law, pp. 322-3.
Hickman *v. Sawyer* (4th C. C. A.), 216 F. 281-285.

"If the note or bill is founded in fraud or or *was* fraudulently *obtained* and put in circulation, the endorsee must prove he paid value for it before he can recover the amount."

Collins *v.* Gilbert, 94 U. S., 761.

"The mere possession of the paper under such circumstances is not enough."

Stewart *v.* Lansing, 104 U. S., 510;
Smith *v.* Sac County, 11 Wall., 139.

"The reason of this rule has been stated to be that the proof of fraud or illegality of the inception of the instrument raises a presumption that the party to the fraud who formerly held the paper and who is precluded from recovering thereon himself has placed it in the hands of another to sue upon it for him and this presumption the holder must overcome."

4 A. & E. Enc. Law, pp. 322-323.

The case is much stronger when there is no transfer of negotiable paper, but only an equity set up.

Now the evidence in the removal case which was closed prior to March 21, 1901, Kellogg has

admitted showed that Greene during the course of five years had received over $722,528.03 of funds embezzled from the Government as his share of the profits.

Exhibit F to the bill, which is admitted correct by stipulation shows that almost immediately after the first finding of probable cause of Greene's guilt on February 28, 1900, as admitted by Kellogg in his answer, Greene commenced to sell off the securities held by him, through a secret account kept in Kellogg's name with Kilbourne & Co., and the proceeds were reinvested in other securities in Kellogg's name and continued to be held by Kellogg for Greene. Certainly under the facts and under the law Kellogg has not overcome the burden on him to show that he was a *bona fide* purchaser for value without notice, relative to any claim in his own behalf or in behalf of anyone else claiming through him subsequent to the issue of the removal warrant of March 21, 1901. So far as any claim Leary is trying to make through Kellogg in the present suit is concerned, it could not have been acquired until his execution of the bail bond of January 20, 1902.

It is true that this evidence was not taken when Kellogg first received securities from Greene in 1899, but it was so taken prior to the March 21, 1901, when the Commissioner, as admitted in Kellogg's answer, made his finding of probable cause of Greene's guilt. At that time Kellogg was on no-

tice of everything which by the stipulation he now admits that record shows. So far as any claim he or his law firm may have for fees arising subsequent to that time, if they can be considered as asserting them, as *bona fide* purchasers of this stock without notice against the claims of the Government, notice to his law partner through that proceeding and in representing O. M. Carter in the Court marshal case in which Carter was convicted as admitted, was as much notice to Kellogg as to his partner.

VI.

Intervenor Leary made out no case on the evidence.

A.

THE EXPRESS CONTRACT AVERRED WAS NOT PROVED.

The case on the Leary Intervention as it was presented on her first appeal to this Court and to the Supreme Court was on demurrer, and therefore its averments were taken as true.

The Supreme Court said:

> "She presents a case which unless read with an adverse mind is a good one on its face, and whatever misgivings we may entertain, we are of opinion that she ought to be allowed to try to prove it."
>
> "In the circumstances it seems to us that the leave to intervene may be granted subject

> to the condition that the evidence already in shall be taken to be evidence against her subject to her right to recall and cross-examine such witnesses for the Government as she may be advised."

Leary *v.* U. S., 224 U. S., 567.

Her intervention as construed by the Supreme Court on demurrer set up an express contract by Greene to indemnify her for going on the bail bond of January 20, 1902, and the placing of the 300 shares of Norfolk & Western stocks in controversy in Kellogg's hands to be held in trust for her, and as averring that her rights in this stock were superior to those of the United States.

Every material allegation of Leary's amended bill of intervention was denied and put in issue by the Government's answer, and especially the averments relative to the existence of the agreement or understanding, averred relative to indemnity as to bond of January 20th, 1902.

The New Equity Rule 31 made it unnecessary for Intervenor to file replication to the amended intervention and puts the case at issue by answer, precisely as if replication were filed under the old rules.

The burden is on the Intervenor to prove her case by competent evidence.

> "Where a material allegation in a bill is denied by answer, the burden is imposed on the plaintiff of proving the same."

Adams *v.* Adams, 21 Wall., 185;
Young *v.* Grundy, 6 Cranch., 51;
Simonton *v.* Winter, 7 Pet., 141.

Leary has wholly failed to offer any testimony, and there is no testimony in the record as to any agreement or understanding relative to indemnity to Leary under the bond of January 20th, 1902, and certainly not relative to any pledge of the Norfolk & Western stock or any other stock of Greene's in consideration of going on that bond.

LETTERS OF MAY 21ST AND JUNE 6TH, 1901.

The above letters from Kellogg to Leary do not supply the evidence necessary to make out Leary's case. They were written relative to particular bonds, afterwards exonerated. Leary was requested by Kellogg to become surety on these long before the bond of January 20th, 1902. The letter of June 6th, 1901, makes no reference to holding security, nor does it appear that it was acted upon.

In the letter of May 21st, 1901, Kellogg does request Leary to go on a bond then required, and does say he holds "the securities," without mentioning what securities. Now as a matter of fact, it is proved that the Delaware, Lackawanna & Western stocks mentioned in the letter of December 14th, 1899, after the bond of that date had been exonerated, were sold March 23rd, 1900. Kellogg therefore did not hold the only securities

which it appears were ever mentioned by him in any communication to Leary.

It does appear, however, that he did continue to hold other securities both before and after May 21st, 1901, for account of Greene, to wit, 1,000 shares of Canadian Southern purchased in part on March 23rd, 1900, by him apparently with all the proceeds of the Delaware, Lackawanna & Western stocks and also 500 shares of Norfolk & Western stocks purchased March 26th, 1913, apparently with proceeds of money other than that of the Delaware, Lackawanna & Western stock.

B.

THERE WAS NO IMPLIED CONTRACT, AND IF THERE WERE THERE COULD BE NO RECOVERY ON IT IN THIS CASE.

The case of *U. S.* v. *Ryder,* 110 U. S., 729, affirmatively settled the question that there was no implied contract of the principal to indemnify his bail in a criminal case.

The Court quotes with approval *Cripps* v. *Hartwell,* 4 Best & S., 414, that:

> "an express contract to indemnify the bail in a criminal case might be sustained but that no such contract is implied by law.

And the Supreme Court said:

> "This decision, made in 1863, has not, so far as we are aware been shaken by any sub-

> sequent case in England or in this country; and we think it is based on very satisfactory grounds."

It appeared to the undersigned that at least the principal reason for the rule ought to apply as well to express as to implied contracts, and that contention was made before this Court; and it was insisted on in this Court that the Intervenor's pleading was so vague, that it must be presumed she meant to plead an implied contract, and if so, it was not effective under the *Ryder* case. But that contention was not sustained.

In *Leary* v. *United States,* 224 U. S., 567, the Supreme Court do not take back the ruling in the *Ryder* case that there is no implied contract of the principal to indemnify bail, but construe the averments of Leary's intervention to allege an express contract. So that as to the question of implied contract, the law stands as ruled in the *Ryder* case.

We think that the fact that both Kellogg and Leary have signally broken down in proving an express contract as to the bond of January 20, 1902, vindicates the view that the pleader was dodging the pleading of an express contract, because one did not exist. It was to this point, we think, the Supreme Court referred relative to their misgivings in reversing the case, to give Intervenor a chance to prove her case.

But if in the face of the Ryder decision this

Court could hold that there was an implied contract of Greene to indemnify Leary on the $40,000.00 bond, that would be a simple contract debt of Greene's to Leary without any reference to any particular security. It would give Leary no claim against the stock tied up in the claim of the Government as its property since 1903.

Greene is not a party to this suit except as to his rights in the Norfolk & Western stock. The jurisdiction of the Court is confined under Section 8 of the Act of 1875 R. S. 733, to cases where the suit is "commenced" to enforce "any legal or equitable lien."

If there were an implied contract of Greene to indemnify Leary on the $40,000.00 bond, Leary would have to put that contract in judgment before he would have a general lien even in the State where rendered, not to say in other States. He would be a simple contract creditor having no standing in a court of equity in Virginia, even if Greene were a party here, not even against Greene, much less against the United States, on Intervention.

U. S. *v.* Carter (Searles Intervention), 192 F. R., 311 (C. C. A. 7th Cir).
Swan Land Co. *v.* Frank, 148 U. S., 610.

C.

A PROMISE TO PAY A DEBT OUT OF A PARTICULAR FUND CREATES NO EQUITABLE LIEN OR RIGHT IN THE FUND.

Even if the letter of December 14, 1899, could be made applicable by implication to the bail bond of January 20, 1902, it would give Leary no equitable right in the Norfolk & Western stock.

Only 300 shares of Del., Lack. & Western stock is mentioned in the letter of Kellogg to Leary of December 14, 1899, without any description of what particular shares were intended.

Kellogg held 400 shares of Del., Lack. & Western stock represented by certificates 122324 to 122327, which he sold on March 23, 1900 (See Exhibit F. to the bill, which is admitted correct by stipulation). Which 300 shares was referred to in the letter of December 14, 1899, is not attempted to be shown by any evidence.

In *Seymour* v. *R. R. Co.*, 25 Barb. (N. Y.), 284, the Court, after reviewing the common law authorities, said (p. 304):

> "A lien must have a specific reference. It must necessarily apply to some *designated* property, either in *esse* or expectancy, and this clearly and unmistakably. Unless the agreement or mortgage plainly describes or designates particular lands it must be regarded as a mere executory contract, and enforceable only as such. (Winslow *v.* Merchants Ice Co., 4 Met. 306)."

It was held in that case that a mortgage which described the lands only as "all real estate owned by the mortgagor" was not good against general creditors.

This rule applies to all kinds of property personal as well as real.

> "It is essential to an equitable lien, that the subject matter be identified."
>
> Grinnel *v.* Suydam, 3 Sandf. (N. Y.), 132.
> Drake *v.* Taylor, 7 Fed. Case No. 4067;
> 25 Cyc., 671.

> "Nor does the bond furnish a sufficient description of the land so that a specific performance can be asked from a court of equity. No decree can be given for a conveyance of any particular part of the land. The bond is for 700 acres; the survey includes 2,000 acres."
>
> Boone *v.* Childs, 10 Peters, 193.

Again, even if the 300 shares of Del., Lack. & Western stocks had been sufficiently described, the terms of the letter of December 14, 1899, never provided that the custody of the stocks should be given to Leary. By going on the bail bond Leary became independently indebted to the United States.

Now, the letter of December 14, 1899, simply agreed that in case Leary's liability on the bail bonds of that date should be established, *Kellogg,*

Greene's agent, would apply the 300 shares of Del., Lack. & Western stocks in payment of Leary's obligation. This was no agreement by Kellogg or for Greene that dominion and custody over the stocks should ever be surrendered by pledge or otherwise to Leary. It could only mean that Kellogg would sell the stocks and would pay over the proceeds to the Government on the happening of the event in satisfaction of Leary's obligation.

In this respect this case is identical with:

Christmas v. *Russell*, 14 Wall., 69,

where the Supreme Court held the agreement void.

There, as here, the surety on a bond undertook to set up a lien or trust in specific security for his indemnity under agreement with the principal. The surety relied upon a letter much stronger than that in the case at bar because the particular security was specified and the letter said:

> "I have ever held the Lyons note as sacred for the payment of this debt, and have it now in New York, endeavoring to sell it with the mortgage to pay this debt."

The Supreme Court say:

> "These letters contain no words of transfer and nothing which by construction or otherwise can have any effect in that way.

> "An agreement to pay out of a particular fund, however clear in its terms is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intention to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, any authority to collect or any power of revocation."

In the case at bar the fact that the Government tied up exactly $40,000.00 par value of stock and that the bond of January 20th, 1902, was exactly $40,000 is merely a coincidence and has no significance. In the first place, the Delaware & Lackawanna stocks mentioned by Kellogg in his letter of December 14th, 1899, consisted of 300 shares.

In the next place the Norfolk & Western stock bought March 26th, 1900, consisted of 500 shares of the par value of $50,000.00 but cost only $18,750.00. And lastly, Kellogg had sold and delivered to Greene 100 shares of the 500 on Sept. 10th, 1903, very shortly before the bill was filed. In other words, so far as any inference is to be drawn from the evidence there was complete dominion exercised by Greene and Kellogg over the whole line of securities to dispose of them as they pleased. And even if we could assume that there was an understanding similar in general intent to the one of December 14th, 1899, that agreement in effect was merely a promise to sell some securities and

apply the proceeds to the debt which might be adjudged against Leary.

Case Distinguished.

Intervenor's counsel cite as militating against this contention the case of

Sexton *v.* Kessler, 225 U. S., 90.

There is no difficulty about the Kessler case whatever. It was a suit brought by a trustee in bankruptcy in the lower court in 1907 long prior to the amendatory act of 1910 which put the Trustee in the position of a judgment or lien creditor. Until that act, as the court points out (p. 97), he stood in the shoes of the bankrupt with no better right than the bankrupt or a simple contract creditor. Also as Mr. Justice Holmes points out, the securities were *specifically described when placed in escrow kept separately, and the pledgee actually took physical possession* of them prior to the bankruptcy in pursuance of the preceding agreement.

But aside from this, the bail bond of December 14, 1899, was exonerated on February 20, 1900, and no proof is offered of any new indemnity agreement, as to any other securities, and no proof whatever relative to the bail bond of January 20, 1902.

D.

Even if Leary had proved an express contract relative to the bond of January 20th, 1902, her claim would be inferior to that of the Government.

BURDEN AS TO WANT OF NOTICE ON LEARY.

The above would be true, because when the Government has shown an antecedent equitable title to the property, and Greene's title is shown to have been acquired by fraud, the burden is thrown on Leary to prove as a *bona fide* purchaser for value without notice and no proof whatever is offered by her on that subject. The Government, however, has in addition shown constructive notice of the fraud to James D. Leary because the bond signed by Leary refers to the Removal record, and he was put on notice of all it shows.

GOVERNMENT'S THE OLDEST EQUITY.

Leary's intervention never set up anything but an equity. It did aver that there was a delivery to Kellogg of a specific 300 shares of Delaware, Lackawanna & Western stock to be held by him in trust, but those averments have not been sustained by the proofs even as to the letter of December 14, 1899, from Kellogg to Leary. The proofs show that Kellogg had 400 shares of stock answering the general description, and the letter was

an agreement to hold and apply the proceeds of 300 shares not specifically described or set apart, to Leary's obligation on the first bond, on the happening of the event of the obligation maturing. The Supreme Court has on Leary's first appeal construed her intervention as setting up only an equitable claim to the stock. Assuming that her equitable claim were proved, and that she was not on notice, still the right of the Government being prior in time would prevail.

> "When both parties claim an equitable title the one who is prior in time is deemed the better in right."
>
> Boone *v.* Childs, 10 Pet. 177-209-10-11, 16 Cyc., p. 139, and cases cited.

> "The purchaser of an equitable interest purchases at his peril, and acquires the property burdened with every *prior charge* upon it."
>
> Shirras *v.* Cary, 7 Cranch., 34.
> Vattier *v.* Hinde, 7 Pet., 252.
> Hallett *v.* Collins, 10 How., 174.

> "The rule with regard to purchasers of a mere equity is, *Prior in tempore potior in jure.*"
>
> Hallett *v.* Collins, 10 How., 185.

> "It is the settled doctrine of this Court that where the equities of the parties are

equal, and neither has the legal title, the one who has the prior equity must prevail."

Grimstone *v.* Carter *et al.,* 3 Paige Ch. (N. Y.) 420-436.

CASES DISTINGUISHED.

Counsel for appellant Leary cite the case of *Mott* v. *Clark,* 9 Penn. St. R., 399, 49 Amer. Dec. 566 and cases there reviewed to the point that an *assignee* of a chose in action takes it freed from latent equities in third persons, and that the same rule applies to mortgagees. That rule applies only to cases in which there has been an actual transfer of title to the purchaser without notice, and not to the acquirer merely of an equitable right in assets left in the actual possession of the other person to the alleged contract, and no transfer of the legal title.

It is also subject to the exception already pointed out, that if the antecedent holder is shown to have acquired the property by fraud the burden is shifted to the assignee to show want of notice.

THE GOVERNMENT THE VIGILANT CLAIMANT.

In the case at bar the Government had traced and tied up the Norfolk & Western stock five years before Leary intervened. Her intervention alleges an express substitution of the Norfolk & Western stock for the Lackawanna stock, and renewed

pledge. She failed to make proof of this, and now relies upon a tracing of the original pledge as of a trust fund. She now relies upon the Government's tracings to claim that the Lackawanna & Western was converted into other stock, and to claim the benefit of that tracing so as to cut out the Government's claim. The Government's claim to the Norfolk & Western is traced through sales and reinvestments by reason of the exercise of *an election* to follow the reinvestment under the rules applicable following trust funds. If Leary had an equity in the Delaware, Lackawanna & Western stock, she could have elected to follow it into the 1,000 shares Canadian Southern not concerned in the Government's tracing, or to have sued Greene or Kellogg for the conversion, and she will not be allowed in a court of equity to stand by five years, while Greene and Kellogg made way with the other stocks which she might have claimed and then by adopting the Government's tracings and elections to claim the particular stock reinvestment which the Government elected to follow and has preserved by its vigilance.

16 Cyc., 140.

VII.

The decree of the court below should be reversed and that of the District Court affirmed with costs and damages for delay.

Intervenor Leary prosecuted her separate appeal, and was the only appellant to give a supersedeas bond.

The facts show such a total failure to make out her case on so many different grounds that there does not appear to have been any reasonable ground for prosecuting her appeal. All the costs incident to her appeal, with damages to the Government for delay, should be awarded against her, and the costs incident to Kellogg's appeal should be awarded to the Government against him.

Respectfully submitted,

MARION ERWIN,
Special Asst. to the
Attorney General.

Office Supreme Court, U. S.
FILED
DEC 11 1916
JAMES D. MAHER
CLERK

No. 5[redacted] 194

In the Supreme Court of the United States

OCTOBER TERM, 1916.

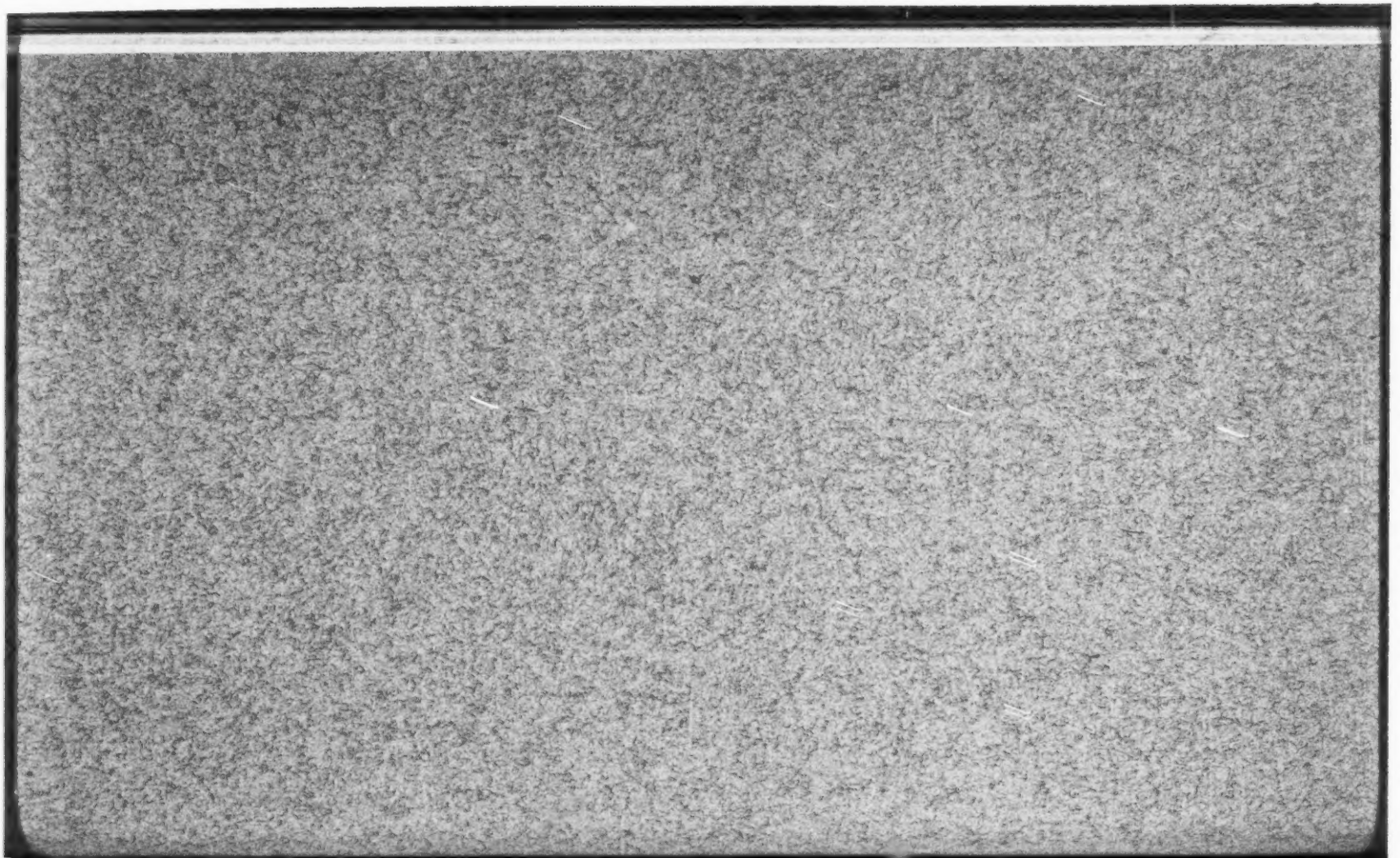
UNITED STATES OF AMERICA,
Appellant,

against

DANIEL J. LEARY and GEORGE LEARY, Administrators of James D. Leary, deceased, LUTHER LAFLIN KELLOGG and THE NORFOLK & WESTERN RAILWAY COMPANY,
Appellees.

MOTION BY APPELLEES TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION.

Lapiants & Dunklin Printing Co., 24-26 South William St., New York



Supreme Court of the United States.

UNITED STATES OF AMERICA, *Appellant,* *against* DANIEL J. LEARY and GEORGE LEARY, Administrators of James D. Leary, deceased, LUTHER LAFLIN KELLOGG and THE NORFOLK & WESTERN RAILWAY COMPANY, *Appellees.*	No. 527 October Term, 1916.

To the Honorable Marion Erwin, Special Assistant to the Attorney General, Solicitor for United States of America, appellant in the above entitled appeal,
115 *William Street, New York City.*

Sir:

Please take notice that on the record of appeal and upon the printed brief, a copy of which is herewith served upon you, we shall, on Monday, the 8th day of ~~June~~ January, 1917, and if motions are not then heard, on the next and succeeding motion day of this Court, make and submit to the Supreme Court of the United States, at a stated term thereof, to be held at the Capitol, in the City of Washington, District of Columbia, the motion, copy of which is hereto attached, and that we shall then

and there move said Court for an order dismissing the appeal for want of jurisdiction and for the reason that the appeal is not from a final judgment or decree as appears from the face of the record herein, and we shall thereupon move for such other and further relief as shall be just in the premises.

Dated, December 4th, 1916.

Respectfully,

JOHN D. EASLEY,
J. T. COLEMAN, Jr.
AUBREY E. STRODE,
Solicitors for Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased.

SUPREME COURT OF THE
UNITED STATES.

UNITED STATES OF AMERICA, *Appellant,* *against* DANIEL J. LEARY and GEORGE LEARY, Administrators of James D. Leary, deceased, LUTHER LAFLIN KELLOGG and THE NORFOLK & WESTERN RAILWAY COMPANY, *Appellees.*	No. 527 October Term, 1916.

Now come Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, by John D. Easley, J. T. Coleman, Jr., and Aubrey E. Strode, their counsel, and move to dismiss the appeal taken herein by the above named United States of America, on the ground that this Court has no jurisdiction of the same in that the appeal taken to this Court is not from a final judgment or decree.

JOHN D. EASLEY,
J. T. COLEMAN, Jr.
AUBREY E. STRODE,
Solicitors for Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased.

SUPREME COURT OF THE
UNITED STATES.

UNITED STATES OF AMERICA, *Appellant,* *against* DANIEL J. LEARY and GEORGE LEARY, Administrators of James D. Leary, deceased, LUTHER LAFLIN KELLOGG and THE NORFOLK & WESTERN RAILWAY COMPANY, *Respondents.*	No. 527 October Term, 1916.

Sir:

Please take notice that on the record on appeal and upon the printed brief, a copy of which is herewith served upon you, we shall, on Monday, the 8th day of January, 1917, and if motions are not then heard, on the next and succeeding motion day of this Court, make and submit to the Supreme Court of the United States, at a stated term thereof, to be held at the Capitol, in the City of Washington, District of Columbia, the motion, copy of which is hereto annexed, and that we shall then and there move said Court for an order dismissing the appeal of the United States for want of jurisdiction and for the reason that the appeal is not from a final judgment as appears from the face of the record herein, and we shall thereupon move

for such other and further relief as shall be just in the premises.

Dated, December 4, 1916.

Yours, etc.,

ABRAM J. ROSE,

Solicitor for Luther Laflin Kellogg.

Office and Post Office Address:

115 Broadway, Manhattan,

New York City.

To

MARION ERWIN,

Solicitor for Appellant.

SUPREME COURT OF THE
UNITED STATES.

UNITED STATES OF AMERICA, *Appellant*, *against* DANIEL J. LEARY and GEORGE LEARY, Administrators of James D. Leary, deceased, LUTHER LAFLIN KELLOGG and THE NORFOLK & WESTERN RAILWAY COMPANY, *Respondents.*	No. 527 October Term, 1916.

Now comes Luther Laflin Kellogg, the respondent above named, by Abram J. Rose, his counsel, and moves to dismiss the appeal taken herein by the above named United States of America, on the ground that this Court has no jurisdiction of the same in that the appeal taken to this Court is not from a final judgment or decree.

SUPREME COURT OF THE
UNITED STATES.

UNITED STATES OF AMERICA, *Appellant,* *against* DANIEL J. LEARY and GEORGE LEARY, Administrators of James D. Leary, deceased, LUTHER LAFLIN KELLOGG and THE NORFOLK & WESTERN RAILWAY COMPANY, *Appellees.*	No. 527 October Term, 1916.

BRIEF OF APPELLEES ON MOTION TO DISMISS APPEAL.

I.

Statement.

The facts appearing on the record, so far as pertinent to this motion are:

In the month of December, 1903, a Bill in Equity was filed in the Circuit Court of the United States for the Western District of Virginia, in which the United States was complainant, and Benjamin D. Greene and Luther Laflin Kellogg and the Norfolk & Western Railway Company were defendants. Record page 11.

The bill alleges in substance that by conspiracy

and fraud in getting and performing Government contracts, Government moneys had been paid to Greene which had been finally invested in Norfolk & Western Stock which was in the hands of the defendant Kellogg with knowledge and notice of the fraud, and the relief, among other things asked, was that the sale of the stock during the pendency of the action be restrained, that the stock be impressed with the trust in favor of the United States and the stock or its proceeds turned over to the complainant. Record page 11 to 38.

The defendant Greene defaulted.

The defendant Kellogg answered denying any knowledge of the fraud of Greene and that if any fraud had been committed by him that he, Kellogg, had no notice or knowledge of it; that he was trustee for one James D. Leary and held the Norfolk & Western stock as such trustee. That in 1899 when Greene was indicted, Leary became his surety on a bail bond and that certain stock was deposited with Kellogg as indemnity to Leary. The stock deposited was sold with the consent of Leary and the proceeds invested in the Norfolk & Western stock which took the place of the stock originally deposited. That he held the stock as a bona fide holder, as security for the obligation to Leary and to secure the payment to him, Kellogg, and his firm for services. Record, pages 42 to 53.

The Norfolk & Western Railway Company answered disclaiming any interest in the controversy. Record pages 38, 39.

James D. Leary died in April, 1902, Record page 60. Mary C. Leary was appointed his administratrix and on the 18th day of April, 1904, filed a petition for leave to intervene in the action and the proposed Bill of Intervention, Record pages, 55 to 62. This petition was heard and denied.

Record page 65. It was affirmed on appeal to the Circuit Court of Appeals but was reversed by the United States Supreme Court. Record p. 67 and 68. (See 224, U. S. 567).

After this reversal, an amended bill of intervention was filed by Mrs. Leary, as administratrix, on May 30th, 1913, Record, pp. 69 to 77. This bill, in substance, sets up that James D. Leary went upon the bond for the appearance of Captain Benjamin D. Greene, and that as indemnity for his becoming surety for Greene, some certain Delaware, Lackawanna & Western Railway stock had been deposited with the petitioner Luther Laflin Kellogg to be held by him in trust until Leary was released from the bond.

That the Lackawanna stock was sold and the Norfolk & Western stock, the subject of the action, was substituted in place of the stock originally deposited and that the stock was held by Kellogg as trustee and depositary.

That Greene forfeited his bail and that suits had been brought on the forfeited recognizance and that judgment had been entered in that action against the intervenor for $35,377.46, with interest and costs amounting to $40,802.00, which was paid by her to the United States as of December 31st, 1910, and that she was entitled, as administratrix to have the stock, or sufficient of the proceeds thereof, the stock and accumulated interest being larger than the amount due her, paid over to her, in repayment of the said sum of $40,802.00 so paid by her, with interest thereon from December 31st, 1910.

The United States answered this Bill of Intervention alleging that the first bond upon which Leary was surety for Greene had been exonerated, Record p. 80, that the second one had also been exonerated and that the bond that was for-

feited and on which the judgment was obtained was not secured by any deposit with Kellogg, Record, pp. 80, 81. That Leary and Kellogg took the stock with knowledge and notice of the fraud of Greene. Record, p. 85. It admitted the recovery of the judgment against the Leary estate, and the payment thereof by the intervenor as above set out, but alleged that the intervenor did not pay it when first recovered but had contested it and appealed and allowed interest and costs to accumulate. Record, pp. 84 and 85. That the value of the stock and the dividends was greater than the amount claimed to have been paid by the administratrix on account of the judgment. Record, p. 85.

The defendant Kellogg did not answer the bill of Intervention but did file an amended answer to the original bill. Record, pp. 86 to 99. This answer does not vary his claim that he was acting as trustee for Leary but makes that claim somewhat clearer and refutes any claim that he was under personal obligation to Leary, and sets out the letter, Record, p. 98, under and pursuant to which the original deposit of stock for Leary's indemnity was made.

The cause on the original Bill and the bill of intervention came to trial before the District Court and were tried together. No opinion of the Trial Judge was written but there was a decree finally disposing of the matter adversely to all claims on the part of Kellogg and the Leary Estate, and holding that the United States was entitled to the stock and the accumulated dividends, refusing to give Kellogg, as trustee, any commissions or expense for defending the trust. Record, pp. 129, 131.

An appeal was taken to the Circuit Court of Appeals by Mrs. Leary, as administratrix, and also by Kellogg. These appeals were numbered in the Circuit Court of Appeals, 1277 and 1278. Record, pp. 136, 139.

The appeals were heard together as one case by the Circuit Court of Appeals for the Fourth Circuit and by the decrees of that Court, entered in each cause, in November, 1915, the decree of the District Court was reversed and each cause remanded "To the District Court of the United States for the Western District of Virginia, at Lynchburg, for further proceedings in accordance with the opinion of this Court." Record, pp. 151, 152.

From the decrees entered in these two causes an appeal was taken to this Court by the United States, the petition for appeal being filed December 10th, 1915, and in January, 1916, the United States took an appeal to this Court in each of the causes.

The record on all three appeals is one book under the number 527.

Before the appeals were heard in the Circuit Court of Appeals for the Fourth Circuit, Mary C. Leary died and Daniel J. Leary and George Leary were substituted as administrators of James D. Leary, deceased, in her place. Record, pp. 139 and 140.

By the opinion of the Circuit Court of Appeals it is held that the evidence showed that neither Leary nor Kellogg when the first bond was signed in 1899, then knew or had reason to believe that the securities which Greene placed in Kellogg's hands were not honestly acquired, (Record, p. 145) and that Kellogg, as trustee, held the stock, the subject of this action, as an indemnity for

the final obligation under which the Leary estate had been compelled to pay the judgment in favor of the United States, (Record, p. 150) and that the Leary estate had established a claim to the stock in question which is superior to the claim of the United States. Record, p. 151. The opinion also notices that Kellogg claimed to be compensated for counsel fees and expenses in protecting the trust which, as before stated, the Trial Court had refused. Record, p. 148.

II.

The judgment of the Circuit Court of Appeals is not a final judgment in form or substance.

In form it is "that the decree of the said District Court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the District Court of the United States in the Western District of Virginia at Lynchburg for further proceedings in accordance with the opinion of this Court." Record, pp. 151, 152.

The judgment is not final in substance for if the case had gone back to the District Court to proceed in compliance with the Circuit Court of Appeals, it would have been necessary to have put in evidence to support the contention of the United States that the intervenor was "stubbornly litigious" (R., p. 85) in contesting the payment of the judgment on the forfeited recognizance, the District Court then being in position to determine whether she had wrongfully carried out the litigation so as to increase interest and whether the

Leary Estate was entitled to recover the amount paid by it or some lesser amount. Evidence must be offered in the District Court of the services and disbursements of Kellogg as trustee, and that court on such evidence must determine what, if any, allowance should have been made to him for commissions or for expenses and fees in protecting his trust. It must then direct a sale of the stock, ascertain the amount of the accumulated dividends, direct the payment of the amount found due to Leary, the amount, if any, allowed to Kellogg, and the balance to the United States and thus make a final decree that would have settled the rights of all the parties.

If this motion should not prevail and this Court should affirm the decree of the Circuit Court of Appeals, it would still be necessary to go back to the District Court, introduce evidence and have that court determine how much should be paid to the Leary Estate, how much to Kellogg and the balance that would come to the United States.

The Circuit Court of Appeals has settled, so far as the District Court is concerned, the question of priority of lien, as between the Leary Estate and the United States, and has ordered a new trial to ascertain the amount of these liens. Therefore the judgment is not final in form or substance and no appeal lies to this court except from a final judgment.

Judicial Code, §§ 128, 241;
Bostwick *v.* Brinkerhoff, 106 U. S. 3;
United States *v.* Krall, 174 U. S., 384;
McFarland *v.* Brown, 187 U. S., 239;
United States *v.* Beatty, 232 U. S., 463.

III.

If this appeal is dismissed and the cause ordered before the District Court and a decree made therein, if it be erroneous and ultimately operates prejudicially to the United States, the latter may, of course, secure its correction by appeal to this Court, but not until the case proceeds to a final judgment in the Circuit Court of Appeals.

United States *v.* Beatty, 232 U. S., 463;
Citing United States *v.* Denver & R. G. R. Co., 191 U. S., 84;
Messenger *v.* Anderson, 225 U. S., 436;
Lickendorf *v.* Steinfield, 225 U. S., 445;
Union Trust Co. *v.* Westhus, 228 U. S., 519.

IV.

The Motion to dismiss the Appeal should be granted.

EASLEY & COLEMAN,
AUBREY E. STRODE,
Solicitors for Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased,
Appellees.

ABRAM J. ROSE,
Solicitor for L. Laflin Kellogg, Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, APPELLANT,
v.
DANIEL J. LEARY AND GEORGE LEARY, administrators of James D. Leary, deceased, Luther Laflin Kellogg, and the Norfolk & Western Railway Co. } No. 527.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court *during the next term.*

This is a suit in equity filed by the United States on December 19, 1903, in the Circuit Court of the United States for the Western District of Virginia against Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk & Western Railway Company, seeking *inter alia* to subject to the claims of the United States 400 shares of Norfolk & Western Railway Company stock standing upon the books of that

company in the name of L. L. Kellogg, alleged to be held by the latter for Benjamin D. Greene and to constitute an investment made by Greene with a portion of a large fund fraudulently diverted by Greene to his own use from certain monies intrusted by the United States to one Oberlin N. Carter, pursuant to a conspiracy between Greene, Carter, and others.

On the filing of the bill, the District Court issued a rule *nisi* for an order to restrain, *pendente lite*, the railway company from transferring the stock or paying dividends thereon to Kellogg. Greene failed to make answer and a decree *pro confesso* was duly entered against him.

Kellogg filed an answer in which, after admitting the holding of the stock for Greene, he set up a claim upon it as pledged to him to secure attorney's fees and certain other obligations alleged to have been personally assumed by Kellogg to one Leary because of the latter going on certain bail bonds for Greene. In an amended answer Kellogg made no averment of any agreement as to the stock being held either as security for fees or indemnity either to Leary or himself at the time of the execution of said bail bonds and apparently appeared in the position of a naked depository for Greene.

Thereafter Mary C. Leary, as administratrix for James D. Leary, deceased, filed in the cause a petition for leave to intervene, setting up an equitable claim for the stock on the ground that it had been placed in

Kellogg's hands by Greene to indemnify Leary for becoming Greene's bail upon a bond in a criminal case, there having been a "condition and understanding" between Greene and Leary to that effect at the time of signing the bond which subsequently had become forfeited. Leave to intervene was denied by the District Court. (163 Fed. 442.) On appeal to the Circuit Court of Appeals for the Fourth Circuit the order of denial was affirmed (184 Fed. 433), but on appeal to this court the decree of the Circuit Court of Appeals was reversed and leave to intervene directed (224 U. S. 567).

Subsequently, Mary C. Leary, administratrix, filed an amended intervention in which it was averred that judgment had been recovered against her on the bail bond of Green by the United States and that she had paid the same. She also prayed that the stock and accumulated dividends be applied to reimbursement to her of the amount of the judgment and interest thereon from the time of its payment. Answer to the amended intervention was filed by the United States. The cause was heard by the District Court upon the pleadings and evidence and a decree entered awarding the stock and dividends accrued to the United States "free from the claims of all other parties hereto." Kellogg and Mary C. Leary took appeals to the Circuit Court of Appeals. Because of the death of Mary C. Leary, an order was subsequently entered substituting in her place Daniel J. Leary and George Leary, administrators.

The Circuit Court of Appeals reversed the decree of the District Court on the ground *inter alia* that the evidence showed an agreement that the stock involved should remain in the hands of Kellogg, as trustee, for the protection of Leary as surety on Greene's bail bonds and that the right of Leary's estate to such stocks was superior to that of the United States (229 Fed. 660). From this decree the United States prosecuted the present appeal.

A motion to dismiss on the ground that the decree of the Circuit Court of Appeals was not final was denied by this court on February 5, 1917.

The case has been pending in the courts for a period of 13 years; it is the last of a series of suits brought by the Government to subject to its claims assets constituting investments made of Government funds fraudulently diverted in the famous Carter frauds; and it has been before the Circuit Court of Appeals for the Fourth Circuit twice and before this court once. For these reasons an early determination thereof by this court is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1917.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, APPELLANT,
v.
DANIEL J. LEARY AND GEORGE LEARY, administrators of James D. Leary, deceased, Luther Laflin Kellogg and the Norfolk & Western Railway Co. } No. 527.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS.

STATEMENT.

The bill.

On December 19, 1903, a bill in equity was filed in the Circuit Court of the United States for the Western District of Virginia, in which the United States was complainant and Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk & Western Railway Co. were defendants.

The bill sought among other things to subject to the claims of the United States 400 shares of Norfolk

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& Western Railway Company stock of the par value of $40,000, standing upon the books of that company in the name of L. L. Kellogg, alleged to be held by the latter for Benjamin D. Greene, and to constitute an investment made on March 26, 1900, with a portion of a fund of $722,528.23 fraudulently diverted by Greene to his own use through conspiracy with Oberlin N. Carter and others from a fund intrusted by the United States to Carter, an Engineer officer, for river and harbor improvements. *Answer under oath from the defendants was waived.* The bill was filed in the Western District of Virginia, the district of the residence of the railway company, under the principles recognized by this court in *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1.

Greene and Kellogg, being nonresidents, were duly served (R. 3) under section 8 of act of Congress of March 3, 1875, 18 Stat. 470, 472, and decree *pro confesso* on the bill was duly entered against Greene at April Rules, 1904 (R. 3).

The Norfolk & Western Railway Co. filed an answer admitting that the stock stood on its books in Kellogg's name and submitted itself to the jurisdiction of the court, as a stakeholder (R. 3). On the filing of the bill, the court issued a rule *nisi* for order to restrain, *pendente lite*, the railway company from transferring the stock or paying dividends thereon to Kellogg (R. 3). The defendant Kellogg filed a demurrer to the bill, which was overruled (R. 3).

KELLOGG'S ANSWER AND AMENDED ANSWER.

The defendant Kellogg on March 7, 1904, filed an answer to the bill (R. 42) which admitted the holding of the stock for Greene, set up certain claims upon it as pledged to him by Greene to secure attorney's fees and as indemnity to Kellogg for certain obligations alleged to have been personally assumed by Kellogg to Leary for the latter going on a bail bond for Greene on December 14, 1899, and alleged to apply "by understanding" to a later bail bond of January 20, 1902. The Government filed a general replication to that answer (R. 4).

By a stipulation of December 21, 1905 (R. 121, 123, 124), it was shown that Kellogg paid himself out of the funds held by him for Greene amounts aggregating some $7,762.59, being all the claims he had against Greene prior to the filing of the Government's bill.

On October 3, 1913, and subsequent to the Leary intervention hereinafter mentioned, Kellogg filed an amended answer to the bill (R. 86). In his amended answer Kellogg made absolutely no averment of any agreement or understanding either as to the Norfolk & Western stock being held as security for fees or for indemnity either to Leary or Kellogg at the time of the execution of the bail bond of January 20, 1902, or in connection therewith. There is no averment therein that anything was due to Kellogg or his firm by Greene for fees, disbursements, or otherwise.

The amended answer leaves Kellogg, on his own averments, as a holder of Greene's stock in the position of a naked depository for Greene, without any personal claim thereon whatever, either in his own behalf or for Leary.

THE LEARY INTERVENTION.

On April 18, 1908, Mary C. Leary, administratrix of James D. Leary, deceased, filed in the said cause a petition (R. 55) for leave to intervene, to which was attached a copy of her proposed intervention.

The proposed intervention set up an equitable claim to the Norfolk & Western stock upon the allegation that it had been placed in Kellogg's hands by Greene to indemnify Leary for becoming Greene's bail upon a bond in a criminal case, dated January 20, 1902, upon an understanding between Greene and Leary to that effect, and that the bond had since been forfeited. To that petition the United States filed objections in the nature of a demurrer, and leave to file the intervention was denied principally upon the ground that the alleged agreement was against public policy (R. 65). Mary C. Leary appealed the denial order to the Circuit Court of Appeals and then to this court, which reversed the trial court, holding that an express contract was averred, and that this was not against public policy. It gave leave to intervene on terms. *Leary* v. *United States*, 224 U. S. 567.

LEARY'S AMENDED INTERVENTION.

On the entry of the mandate of this court in the District Court, Mary C. Leary, administratrix, filed

an amended intervention, the averments of which were substantially the same as her original proposed intervention, save for certain additional averments by which she sought to hold the defendant Kellogg personally liable in this proceeding in case the Government recovered the Norfolk & Western stock (R. 69). The amended intervention also contained the following averments (R. 75):

> *Thirteenth.* That on or about the 10th day of September, 1903, the United States of America brought suit against the intervenor in the Circuit Court of the United States for the Southern District of New York upon said recognizance of $40,000 above referred to, to recover the amount thereof; that such proceedings were fully had in said court as that a judgment was entered in said court on or about the 6th day of January, 1908, in favor of the United States of America and against the intervenor upon said recognizance for the sum of $35,377.46, which said judgment, amounting with costs and interest to the sum of $40,802.00, was paid by intervenor to the United States on or about December 31st, 1910.

She prayed (R. 76) that the Norfolk & Western stock and accumulated dividends be applied to the reimbursement to her of the $40,802, with interest from December 31, 1910. The intervenor failed to perfect service of her amended intervention (as she had failed to perfect it in regard to the original intervention) upon the nonresident defendants

Greene and Kellogg under section 8 of the act of 1875, 18 Stat. 472. Greene never appeared to either. Kellogg never appeared to the original, but did enter a special appearance to the amended intervention and had stricken therefrom the averments which sought to obtain judgment against him personally, for want of jurisdiction over his person, and it was so ordered (R. 78).

THE ANSWER OF THE UNITED STATES.

The answer of the United States to the amended Leary intervention (R. 79) put in issue all its material allegations relative to the indemnity agreements alleged particularly in regard to the bond of January 20, 1902.

The ninth paragraph of the said answer contained the following (R. 84):

> These respondents admit that the averment of the paragraph of said bill of intervention numbered "thirteenth" is true, but say that after said judgment for $35,377.46 had been rendered against said intervenor, instead of paying the same she allowed the interest to accumulate and was so stubbornly litigious in contesting the payment of the same that a large part of the costs paid on said judgment were awarded against the said Mary C. Leary individually.

THE FINAL DECREE OF THE DISTRICT COURT.

The case was heard upon the pleadings and evidence in the District Court, and decree was rendered upon the merits (R. 129), awarding the 400 shares of

Norfolk & Western stock and dividends accrued to the United States,

> "free from the claim of all other parties"

to the cause, and directing its disposition to that end. The decree also contained the provision (R. 130):

> That the motion of said L. L. Kellogg that an allowance be made him from the fund in this cause be, and it is, overruled.

If there ever was such a motion it must have been simply a request orally, since there is no such pleading in the record.

Subsequently Kellogg delivered up the certificates for the 400 shares of stock as decreed, and they were turned over to the clerk of the District Court to hold pending Leary's appeal (R. 131).

Kellogg's assignment of errors on his appeal or cross appeal from that decree to the Circuit Court of Appeals (R. 134) assigned no errors for any alleged failure to award him any fees or costs, or other personal claim. The errors assigned by him on the defenses set up in his own answer were all attempts to defend for Greene. He did, however, make two assignments of error, the sixth and seventh, based wholly upon the averments of Leary's intervention that he was trustee for Leary, and not upon any such trust relationship set up in his own amended answer.

THE APPEALS TO THE CIRCUIT COURT OF APPEALS.

The appeals of Mary C. Leary, administratrix, and of Kellogg, were, by stipulations of February 27, 1914 (sec. 3), and March 27, 1914 (R. 136), and

approval thereof by the District Court (R. 10), in effect consolidated and sent up as one record. They were, however, docketed by the clerk in the Circuit Court of Appeals as if they were separate causes, as Nos. 1277 and 1278.

Thereafter, on February 18, 1915, the solicitors for all parties signed an agreed order entitled under the double heading Nos. 1277 and 1278, which was approved by the Circuit Court of Appeals, reciting the death of Mary C. Leary, administratrix, and substituting Daniel J. Leary and George Leary, administrators, in her place in both appeals and treating both appeals as one cause (R. 142).

THE DECREE OF THE CIRCUIT COURT OF APPEALS OF NOVEMBER 12, 1915.

On November 12, 1915, the Circuit Court of Appeals filed its opinion entitled under the double head or title of Nos. 1277 and 1278, reciting, among other things (R. 144), that—

> Separate appeals were taken by Mrs. Leary and Kellogg, but they are consolidated in a single record and may be disposed of in one opinion.

The opinion holds (R. 144–145) that on the evidence and the law applicable, the United States has fully made out its case as against Greene and Kellogg, and

> has proved with requisite certainty the moneys stolen from it are represented by the stock in question.

That (R. 148) Kellogg asserts no personal claim on the record. That (R. 150)—

> The contest here is between Leary's estate and the Government.

And, upon consideration of the evidence (or what that court erroneously assumed to be evidence), it states (R. 151):

> For the reasons above stated we are of opinion that the estate of Leary has established a claim to the stock in question which is superior to the claim of the United States, and it follows that the decree appealed from must be reversed.

The decree was entered on the minutes by the clerk twice, once under No. 1277 and once under No. 1278 (R. 151), and after the preamble is in the following words:

> On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Virginia, at Lynchburg, for further proceedings in accordance with the opinion of this court.

THE APPEALS TO THIS COURT.

On December 10, 1915, the United States filed (R. 152) its petition for appeal, which was duly allowed, to this court, entitled in Nos. 1277 and 1278, from the decrees of November 12, 1915, treat-

ing them as a decree in one cause, and subsequently filed a petition for appeal entitled under No. 1277, which was duly allowed to this court, from the decree entered under that docket number, and another petition for appeal entitled under No. 1278, which was duly allowed to this court from the decree entered under that docket number. Assignments of error were duly filed. These separate appeals were taken merely as a matter of safety, as appears to be the proper practice when the appropriate procedure is in doubt. *Hurst* v. *Hollingsworth*, 94 U. S. 111.

Only one record was sent up, which contains the three appeals, and docketed as No. 527 in this court as was proper under the practice indicated.

The motion of appellees is to dismiss the appeal, because, as they claim, the decree of the Circuit Court of Appeals is not final.

The issues which appellees contend (their brief, p. 12) were left open by the decree for further evidence on remand are:

(1) Whether the statement (R. 84) in the answer of the United States, paragraph 9, to Leary's amended intervention that intervenor Mary C. Leary, administratrix, was stubbornly litigious in contesting payment of the judgment on the forfeited recognizance is true, and whether for that reason she, as administratrix, is entitled to recover a less amount than the amount she claimed for reimbursement of principal, interest, and costs paid out by her as administratrix, and which the Government's answer admitted she had paid out.

(2) That it was left open for Kellogg to offer evidence on remand to establish the amount of an allowance to him for compensation and disbursements and fees for protecting "his trust."

ARGUMENT.

I.

The decree of the Circuit Court of Appeals left nothing to be done in the lower court but enter a decree disposing of the Norfolk & Western stock or its dividends and proceeds, by paying therefrom Leary's claim in full, and the balance, if any, to be paid to the United States.

The decree entered by the Circuit Court of Appeals, directed further proceedings in the District Court only in accordance with its filed opinion, and in that opinion, as we have pointed out, it held that neither Greene nor Kellogg was further interested in the fund, that the contest was wholly between the Leary estate and the United States and then it states (R. 151) that:

> The estate of Leary has established a claim to the stock in question which is superior to the claim of the United States.

The question as to what was Leary's claim is not doubtful or indefinite; it is stated in her intervention to be for reimbursement of the sum of $40,802 paid to the United States by her as administratrix, for principal, interest, and costs on Dec. 31, 1910, and for interest thereon from that date (R. 75–76).

The United States in its answer admitted that she had as administratrix at the time alleged paid to it that sum in satisfaction of the judgment on the bond. It is immaterial that the answer asserted she had been stubbornly litigious, thereby creating costs and interests, because under the decree of the Circuit Court of Appeals it was held (whether erroneously or correctly) that her claim as made was superior to that of the United States. It left no room for taking additional evidence to show that any part of her claim was inferior to that of the United States. It makes no difference that that ruling was without evidence to support it and is otherwise unjustifiable, as we think it was, or the United States would not be appealing. Under that ruling it is unavailing for the Government to litigate Leary's claim any further in the court below.

So also in regard to the claim that the case is open to allow Kellogg to take evidence on an allowance of compensation for fees and disbursements to him as trustee. There were no pleadings in the case on Kellogg's part claiming it. His oral request for such allowance had been denied in the trial court, and he had made no assignment of error thereon, nor did he allege in his amended answer to the bill that he was a trustee for Leary, and the Circuit Court of Appeals in its opinion held that the contest before it was wholly between the Leary estate and the United States.

It is utterly fallacious to assume that a reversal in accordance with that opinion reestablished any right

in Kellogg to fees, costs, or expenses, neither pleaded nor proved by him nor claimed by any assignment of error, or a right to litigate those questions further.

II.

The decree of the Circuit Court of Appeals is final since it settles completely and finally Leary's right to full satisfaction of intervenor's definite claim upon the assets in controversy over the claims of the United States as complainant, to whom they are otherwise awarded.

It has been held by this court that—

> An order of a Circuit Court of the United States in a suit in equity for the foreclosure of a mortgage upon the property of a railroad company that the receiver of the mortgaged property may borrow money and issue certificates therefor to be a first lien upon it made after final decree of foreclosure, and after appeal therefrom to this court and after the filing of a supersedeas bond, establishes, if unreversed, the right of the holders of the certificates to priority of payment over the mortgage bondholders and *is a final decree* from which an appeal may be taken to this court. [*Farmers' Loan & Trust Co.*, 129 U. S. 206.]

In that case the court said (p. 214):

> It is a decree fixing upon the property, on which the trust company now has a first lien, another lien of $120,000, and making it paramount to that. It changes the relation of that company to this property, displaces its rights as settled by a decree now pending in this

> court, and if that decree is affirmed, it in effect modifies it, although this court may say that it should stand and be enforced. This order comes within all the elements of finality which we can imagine to belong to a decree of the Circuit Court. It establishes certain rights of the parties, to the injury, as petitioners believe, of their interests in the property.

In the case of *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207, it was held by this court that a decree in a suit for foreclosing a railroad mortgage, that the claim by an intervening creditor of an interest in certain locomotives in the possession of the receiver and in use on the road, was just, and entitled to priority over the debt secured by the mortgage, is a final decree, upon a matter distinct from the general subject of the litigation; and that it can not be vacated by the court of its own motion after the expiration of the term at which it was granted.

The court said (p. 224):

> In *Williams* v. *Morgan*, 111 U. S. 684, a decree in a foreclosure suit, fixing the compensation to be paid to the trustees under a mortgage from the fund realized from the sale, was held to be a final decree as to that matter; and in *Fosdick* v. *Schall*, 99 U. S. 235, a decree upon an intervening petition in respect to certain cars used by a railroad company under a contract with the manufacturer was so treated. There was a fund in court in that case, but in principle the orders here are the same.

In the case at bar the record shows that so far as Greene and Kellogg are concerned the decree of the District Court was executed prior to any appeal. Kellogg had actually turned over the stock certificates to the clerk of the court. There was nothing left for the court below to do as to them.

If it be possible to construe the opinion of the Circuit Court of Appeals to leave open for proof the question of the exact amount of interest or costs, which Leary paid on the judgment, although those facts were admitted in the answer of the United States, making proof on that point unnecessary, still that would not affect the finality of the decree.

In *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180, this court held that a decree by which the whole purpose of the suit has been accomplished is final; and that an accounting, ordered only in aid of the execution of the decree and which is no part of the relief prayed for in the bill, does not prevent the decree being final where the litigation as to the merits is terminated, and nothing remains to be done but to carry the decree into execution.

CASES DISTINGUISHED.

The following cases cited by appellees in their brief are totally inapplicable to the facts of this appeal, the decree here being on the merits:

Bostwick v. *Brinkerhoff*, 106 U. S. 3.

There the trial court dismissed the complaint for want of jurisdiction, the Court of Appeals of New

York reversed, with directions to the lower court to take jurisdiction and proceed to the merits. On appeal from that order to the Supreme Court of the United States this court, dismissing the appeal, said:

> If the judgment is not one which disposes of the whole case on its merits, it is not final.

United States v. *Krall*, 174 U. S. 385.

In dismissing the appeal there this court held, page 389, that the decree appealed from had determined only one of the legal questions arising on the record and remanded the case to the lower court for further proceedings, and that the record was in such shape that the other issues could not have been nor were they intended to be determined without the taking of additional evidence.

MacFarland v. *Brown*, 187 U. S. 239.

There, as to the order of the Court of Appeals of the District of Columbia, this court, in dismissing the appeal, said (p. 245):

> That the decree of the latter court was not meant to be final is shown by its language, which does not definitely adjudge the whole subject matter, but anticipates further action of the Supreme Court.

United States v. *Beatty*, 232 U. S. 463.

There the Circuit Court of Appeals reversed a judgment of the District Court rendered without a jury trial and directed a trial by jury. This court held that the decree was purely interlocutory.

The authorities cited by appellees to the effect that if this decree be not final, then the United States would have a right to come up to this court and have the interlocutory decree reversed later, on appeal from some final decree which may be hereafter rendered, are not disputed. But the decree appealed from here is not interlocutory, but final on the issue in controversy.

Appellees' motion to dismiss should be denied, with costs.

Respectfully submitted.

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JANUARY, 1917.

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